COURT DECISIONS

FEDERAL TRADE COMMISSION

VOLUME X

January 1, 1976 to December 31, 1976

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FEDERAL TRADE COMMISSION

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PREFACE

COURT DECISIONS—FEDERAL TRADE COMMISSION (1976) is the tenth volume of a series of publications setting forth the text of the majority of cases instituted against or by the Federal Trade Commission in the Federal Courts.

This volume represents a change in the format of the series. No longer will *Annual Supplements* be published to be compiled into quinquennial, hardbound editions. Instead, each year's cumulation will appear in hardbound cover, and quinquennial editions will not be published. The reader will also notice the title of the publication has been changed to reflect the fact the text of relevant statutes is no longer included. Even though the title has been changed, the numerical sequence has been maintained; *i.e.*, the edition for 1976 is Volume X, the edition for 1977 will be Volume XI, etc. Of further interest, this edition does not contain a Cumulative Table of Cases since 1914. The Table of Cases from 1914 through 1975 can be found in Volume IX. A new Cumulative Table of Cases will be established with the publication of Volume XI, COURT DECISIONS—FEDERAL TRADE COMMISSION (1977) and contain all cases reported from 1976 forward.

The bracketed, boldface figures in the text of cases reported by the National Reporter series and the Supreme Court cases reflect the page numbers of the official reporters.

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*Abbreviated as follows:

APA ..... Administrative Procedure Act
CA ..... Clayton Act
DJA ..... Declaratory Judgment Act
FTCA ..... Federal Trade Commission Act
FOIA ..... Freedom of Information Act
SA ..... Sherman Act

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MOBIL OIL CORPORATION v. FEDERAL TRADE COMMISSION et al.*

No. 74 Civ. 311. F.T.C. Docket No. 8934.

(United States District Court, Southern District of New York, January 12, 1976)

1. UNLESS REQUESTED DOCUMENTS FALL WITHIN EXCEPTIONS, ALL IDENTIFIABLE RECORDS MUST BE MADE AVAILABLE UNDER FREEDOM OF INFORMATION ACT.

Under Freedom of Information Act all identifiable records must be made available to the public on demand unless requested documents fall within one of the Act's nine exceptions.

2. UNDER FREEDOM OF INFORMATION ACT, SPECIFIC DISCLOSURE EXEMPTIONS ARE TO BE NARROWLY CONSTRUED.

Specific exemptions from disclosure under the Freedom of Information Act are to be construed narrowly.

3. F.T.C. REGULATIONS REGARDING POLICY OF NOT DIVULGING COMPLAINANTS' NAMES, EXCEPT AS REQUIRED BY LAW, DID NOT JUSTIFY DELETION OF NAMES AND IDENTIFYING DETAILS IN COMMUNICATIONS WITH CONGRESS AND STATE AGENCIES.

Regulations of Federal Trade Commission relating to Commission's general policy not to divulge names of complainants except as required by law afforded no justification for deletion of names and identifying details in communications between Commission and Congress and between Commission and state agency whose production was sought under Freedom of Information Act protecting matters which are specifically exempted from disclosure by statute.

4. LANGUAGE AND PURPOSE OF STATUTORY ENACTMENT CANNOT BE OVERRIDDEN BY AGENCY REGULATIONS OR GUIDELINES.

Neither regulations nor guidelines promulgated by federal agency can override language and purpose of statutory enactment.

5. DISCLOSURE OF ALL NAMES AND IDENTIFYING DETAILS IN COMMUNICATION IS NOT EXPLICITLY FORBIDDEN BY STATUTE AUTHORIZING DISCLOSURES OF SUCH INFORMATION DEEMED IN THE PUBLIC INTEREST BY F.T.C.

Statute relating to additional powers of Federal Trade Commission to make public such portions of information obtained by it, except trade secrets and names of customers, as it deems in public interest authorizes disclosure and not the refusal to disclose, and statute does not within meaning of exemptions under Freedom of Information Act explicitly forbid disclosure of identifying details and all names in correspondence and communications received by Commission.

6. BURDEN OF DEMONSTRATING APPLICABILITY OF EXEMPTIONS AND SHOWING THAT CONTENTS ENTITLED TO PRIVACY RESTS WITH AGENCY REFUSING DISCLOSURE.

Agency refusing to disclose requested documents on ground that they fall

* Reported in 406 F.Supp. 305 (1976).

within the exemption of Freedom of Information Act protecting from disclosure trade secrets and commercial or financial information which are privileged or confidential has burden of demonstrating applicability of the particular exemption, and material must be shown to be independently confidential based on its contents and entitled to a reasonable expectation of privacy.

7. F.T.C. FAILED TO JUSTIFY DELETION OF INFORMATION UNDER EXEMPTION PROVISION OF FREEDOM OF INFORMATION ACT.

Federal Trade Commission, which failed to present a single affidavit by a member of the Commission or its staff stating basis for concluding that documents from which Commission sought to delete names and identifying materials were confidential or privileged and which made no attempt to scrutinize documents individually before blocking out identifying details, failed to carry burden of showing that such deletions were justified under that exemption of Freedom of Information Act protecting privileged or confidential trade secrets and commercial or financial information.

8. ADHERENCE TO FREEDOM OF INFORMATION ACT SCHEME REQUIRES AGENCY TO INDIVIDUALLY SCRUTINIZE DOCUMENTS TO SUBSTANTIATE EXEMPTION CLAIMS REGARDLESS OF FACT THAT SUCH TASK MAY BE VERY TIME-CONSUMING.

Although a request for a large number of documents saddled agency with a substantial time-consuming task with respect to individual scrutinization of the same to substantiate claim that portions of documents were protected from disclosure under Freedom of Information Act exemption relating to privileged and confidential trade secrets and financial information, adherence to the Act scheme required that the job be done.

9. DESPITE COMMISSION'S FAILURE TO SUSTAIN BURDEN OF SHOWING THAT DOCUMENTS WERE PROTECTED FROM DISCLOSURE, COURT DEFERRED SUMMARY JUDGMENT UNTIL AGENCY SUBMITTED APPROPRIATE DOCUMENTATION OF CONFIDENTIALITY CLAIM, AND PROPERLY CLASSIFIED DOCUMENTS.

Although Federal Trade Commission failed to sustain burden of showing that the vast number of documents requested relating to various aspects of petroleum use and from which the Commission had deleted names and identifying material were protected from disclosure under exemption of Freedom of Information Act provision protecting confidential and privileged trade secrets and financial and commercial information, summary judgment was deferred until the Commission had submitted proper documentation of claim of confidentiality and Commission was directed to properly classify documents.

10. COMMISSION WOULD NOT BE ENTITLED TO EXEMPTION UNDER FREEDOM OF INFORMATION ACT UNLESS IT SUBMITTED AFFIDAVITS SUPPORTING ITS CONTENTIONS THAT DISCLOSURE WOULD CONSTITUTE AN INVASION OF PRIVACY, DISCLOSE PROCEDURAL TECHNIQUES, AND HINDER ENFORCEMENT PROCEEDINGS.

Absent any supporting affidavits Federal Trade Commission could not sustain its burden of demonstrating that the revelation of identifying details in Commission's communications regarding various aspects of petroleum use would interfere with enforcement proceedings, constitute unwarranted invasion of personal privacy, disclose identity of any informer or disclose investigative techniques, and Commission was not entitled to claim exemption under that

Freedom of Information Act exception unless it submitted affidavits showing its entitlement to such exemption.

11. EXPLANATORY COMMUNICATIONS MADE AFTER DECISION WAS MADE ARE NOT EXEMPT UNDER FREEDOM OF INFORMATION ACT PROVISIONS.

Intra-agency memoranda written prior to and in connection with formulation of an agency decision fall within that exception to Freedom of Information Act protecting intra-agency memoranda from disclosure while communications made after a decision is reached and designed to explain it are not within exception.

12. COMMUNICATIONS AND INTERVIEWS BETWEEN FTC STAFF AND STATE AGENCY OFFICIALS FELL WITHIN FREEDOM OF INFORMATION ACT EXEMPTION.

An in camera inspection of communications between Federal Trade Commission and state agencies discussing relationship between separate investigations by Commission and a state Attorney General into pricing policies of major brand oil suppliers and a summary of interviews between staff members and officials of state agency written to instruct Commission as to jurisdiction and decision-making process of state agency did fall within that exception to Freedom of Information Act protecting from disclosure intra-agency memoranda.

13. PETROLEUM INDUSTRY REPORT CONTAINING CLOSE ANALYSIS OF FTC'S CURRENT PENDING INVESTIGATION AND LETTERS CONTAINING POLICY OPINION WERE PROTECTED FROM DISCLOSURE BY INTRA-AGENCY EXCEPTION.

In camera inspection of letters written by Federal Trade Commission officials to staff members of federal agencies containing matters of policy opinion and presenting no facts which were severable from policy statements and Commission report on petroleum industry containing a close analysis of current pending investigation by Commission were protected from disclosure under the intra-agency exception to the Freedom of Information Act.

14. INSPECTION REVEALED THAT MOST OF THE DOCUMENTS CONTAINED POLICY DISCUSSIONS AND OPINIONS AND WERE EXEMPTED FROM DISCLOSURE.

In camera inspection of Federal Trade Commission memoranda on information received in communications between staff members of Commission and other agencies, communications dealing with liaison between Department of Justice and Commission in their investigating efforts and communications between Commission or other agencies exchanging information or seeking same showed that most of the documents contained policy discussions and opinions and accordingly fell within the intra-agency memoranda exception to the Freedom of Information Act.

15. DECISION AS TO DISCLOSURE OF MEMORANDA SHOWN TO BE NON-EXEMPT BY INSPECTION WOULD BE WITHHELD PENDING SUBMISSION OF AFFIDAVITS AND COMPILATION AND INDEXING OF DOCUMENTS.

Memoranda by Federal Trade Commission which did not contain, as shown by in camera inspection, opinion and policy deliberations were not entitled to the intra-agency exemption under the Freedom of Information Act, but decision as to disclosure of such documents would be withheld pending Commission's compilation and indexing of documents together with submission of affidavits as to the applicability of the investigatory exception under Act.

16. WHERE IN CAMERA INSPECTION SHOWED DOCUMENTS WITHHELD TO BE

CITIZEN COMPLAINTS, INTRA-AGENCY EXCEPTION PROTECTED THEM FROM DISCLOSURE.

In camera inspection of documents, which had been entirely withheld by Federal Trade Commission pursuant to request for disclosure under the Freedom of Information Act, established that those documents referring to citizen complaints to Department of Justice with respect to oil industry were protected from the disclosure by the intra-agency exception since they related to opinions and decisions involving pending investigation of oil companies and petroleum issues.

17. DELETION OF NAMES OF CONGRESSMEN AND OTHER FEDERAL OFFICIALS WAS NOT AUTHORIZED UNDER EXCEPTION PROVISION OF FREEDOM OF INFORMATION ACT.

To extent that the complainants were customers of oil companies or related business concerns, the deletion of names and identifying details in letters to Department of Justice were mandated by that section of Federal Trade Commission Act authorizing deletion of trade secrets and names of customers and fell within ambit of that exception to Freedom of Information Act relating to materials specifically exempted by statute, but the deletions of names of congressmen or other federal officials were not similarly protected and did not fall within the intra-agency exception of Act since documents contained neither policy nor opinion.

(Syllabus, with substituted captions, taken from 406 F.Supp. 305)

On action to compel disclosure of withheld documents, Court held, inter alia, that the Federal Trade Commission failed to properly establish right to exemption or non-exemption of particular documents under the intra-agency memoranda exemption of the Freedom of Information Act.

Motions disposed of in accordance with opinion.

Donovan, Leisure, Newton & Irvine, New York City, for plaintiff; *Andrew J. Kilcarr*, Washington, D.C., *Charles F. Rice*, New York City, Mobil Oil Corp., of counsel.

Thomas J. Cahill, U.S. Atty., S.D.N.Y., New York City, for defendants; *Gregory J. Potter*, Asst. U.S. Atty., *Calvin J. Collier*, Gen. Counsel, *Gerald Harwood*, Asst. Gen. Counsel, *Robert E. Duncan*, *Mary L. Azcuenaga*, Attys., Federal Trade Commission, of counsel.

Before LASKER, *District Judge*.

[308] By letter dated August 22, 1973, Mobil Oil Corporation requested, pursuant to the Freedom of Information Act (FOIA) the opportunity to inspect and copy all communications pertaining to various aspects of petroleum use[1] from January 1, 1970 to August 22,

[1] Mobil specifically requested:

[F]or the period January 1, 1970 to [August 22, 1973], all communications including letters, reports or memoranda, and notes, transcripts or other memorialization of oral communications pertaining to petroleum (in liquid or gaseous form) supplies, shortages, allocations, imbalances, availabilities, competitive or noncompetitive activities, and any reason therefor or causes thereof, between the Federal Trade Commission (including any member or employee thereof) and

(Continued)

1973 between the Federal Trade Commission (FTC—Commission) and (1) Congress, (2) any federal agency, and (3) any state government or agency. On December 12, 1973, the FTC granted the request in part and denied it in part.

Specifically, the FTC granted access to correspondence between the Commission and Congress, and between the Commission and state governments and agencies, except for the portions of the documents which contained identifying details and names of the persons who communicated with government officials. The FTC also refused to disclose staff opinions or theory, and communications between the Commission and other federal agencies.

Mobil then filed this suit under the FOIA to compel disclosure of all withheld information. Subsequently, on March 6, 1974, the FTC informed Mobil that certain of the communications between the FTC and the states are part of active investigatory files or contained privileged or confidential material, and, as such, were exempt from disclosure.[2]

I.

Deletion of Names and Identifying Details in Communications Between the FTC and Congress and the FTC and State Agencies

The first category of materials in dispute are letters and other documents [309] which constitute communications between the FTC and Congress, and the FTC and state agencies. Although the Commission released these documents to Mobil, it did so only after blacking out virtually all identifying details including the names of the correspondents. Charles A. Tobin, Secretary of the FTC, justified these deletions by stating that:

> The Commission will not release such identifying information because it believes * * * that Citizens have a right to communicate with their government without fear of unwarranted public disclosure. (Letter of December 12, 1975 to Andrew Kilcarr, Ex. E to complaint).

A. any member of the Congress, including any employee of the Congress or any member thereof;
B. any agency of the United States Government; or employee thereof;
C. any State government or any agency or employee thereof.

[2] By memorandum dated June 27, 1974, the government's original motion to dismiss or for summary judgment was denied and the FTC was directed to (1) search for the existence of any relevant tape recordings and (2) file affidavits sworn on personal knowledge of the several department heads who actually supervised the search for the documents requested by Mobil. On September 9, 1974, the office of the U. S. Attorney advised counsel for plaintiff that the search for the documents was complete and that those documents which were not claimed to be exempt from disclosure were available for inspection. On September 26, 1974, the FTC filed the documents with the court for *in camera* review and 98 affidavits concerning the thoroughness of the search for relevant documents and tape recordings. On the basis of these documents, we are convinced, and there is no dispute, that the FTC has conducted a comprehensive search for the requested material and that there are no electronic recordings which concern the subject matter of Mobil's request. See *National Cable Television Association, Inc.* v. *FCC*, 156 U.S. App.D.C. 91, 479 F.2d 183, 190-193 (1973); *Bristol-Myers* v. *FTC*, 138 U.S.App.D.C. 22, 424 F.2d 935 (1970).

The FTC has adhered to this position, which it defends on the basis of what it terms an "informer's privilege" that it asserts is implicit in Exemptions 3, 4 and 7 of the FOIA, 5 U.S.C. § 552(b)(3), (4) and (7).

[1,2] At the outset we reject the agency's argument that the purposes of these three specific provisions of the FOIA may be fused to create by implication an exemption not explicitly stated in the statutory language. As recently as April of this year, the Supreme Court in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 136, 95 S.Ct. 1504, 1509, 44 L.Ed.2d 29 (1975) reconfirmed the principal objective of the FOIA which is:

> "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S.Rep.No. 813, 89th Cong., 1st Sess., 3 (1965); *Environmental Protection Agency* v. *Mink* [410 U.S. 73], *supra.*, at 80, 93 S.Ct. [827], at 832 [35 L.Ed.2d 119] (1973).

According to the language of the FOIA as construed by the Supreme Court, all "identifiable records" must be made available to a member of the public on demand (5 U.S.C. § 552(a)(3)) unless the requested documents fall within one of the Act's nine exemptions. (5 U.S.C. § 552(b)). *NLRB* v. *Sears, Roebuck & Co., supra*, 421 U.S. at 136-137, 95 S.Ct. 1504. Although the validity of the theory of an "implicit" exemption advanced by the FTC has not been squarely presented to any court, the general philosophy of the FOIA as stated by the court in *NLRB* v. *Sears, Roebuck & Co., supra*, the accepted principle that the specific exemptions are to be construed narrowly,[3] and the language of the Act itself make clear that the FTC's justification for deleting identifying details can be sustained, if at all, only on the *independent* applicability of any of the Act's exemptions to the deletions in question. Each exemption upon which the FTC relies must therefore be individually analyzed to determine whether, as defendants argue, it warrants the erasures made.

A. *Exemption 3*

[3,4] The Commission relies first upon the argument that Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f)(FTCA), as well as certain of the FTC's rules and regulations, authorize the deletion of confidential matter and that these statutes and rules bring the material within Exemption 3 of the FOIA which protects matters that are

> "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3)

[3] See, e. g., *Rose* v. *Department of Air Force*, 495 F.2d 261 (1974); *Fisher* v. *Renegotiation Board*, 153 U.S.App.D.C. 398, 473 F.2d 109, 112 (1972); *Bristol-Myers Co.* v. *FTC*, 138 U.S. App.D.C. 22, 424 F.2d 935, 938, *cert. denied*, 400 U.S. 824, 91 S.Ct. 46, 27 L.Ed.2d 52 (1970).

The Commission bases its authority to withhold identifying details in part on the strength of Rules 2.2(d) and 4.10(b) of the FTC's Rules of Practice. 16 C.F.R. §§ 2.2(d), 4.10(b). Section 2.2(d) states that the Commission's "general * * * policy" is not to divulge names of complainants "except as required by law." Section 4.10(a) recites the exemptions to the FOIA with the FTC's analysis of those exemptions, adding, at § 4.10(b), that the Commission may delete identifying details from material it **[310]** makes public if necessary "to prevent clearly unwarranted invasions of privacy." Rather than creating additional criteria for withholding information, these regulations restate—and in § 4.10(a) actually recite—the exemptions contained in the FOIA itself. Even if this were not so, however, neither regulations nor guidelines promulgated by a federal agency, can override the language and purpose of a statutory enactment. Exemption 3 permits a refusal to disclose material only where another *statute* authorizes such action.

Thus, the only possible basis for the applicability of Exemption 3 in the circumstances is Section 6(f) of the FTCA (15 U.S.C. § 46(f)) which provides in language the Commission argues to be relevant:

> § 46 Additional powers of Commission
>
> The Commission shall also have power—
>
> (f) *Publication of information; reports*
>
> To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

The Commission argues that this language authorizes it to determine whether the release of information in its possession would further the public interest. If, as here, the FTC concludes that disclosure of particular documents would not achieve that goal, the agency contends that Section 6(f) prohibits the release of that material, and that it consequently falls within the ambit of Exemption 3 of the FOIA.

[5] We disagree. Section 6(f) confers upon the FTC the right to disclose and publish, with few limitations, information it possesses. By its terms, the statute authorizes *disclosure*—not, as the FTC argues, the refusal to disclose. The sole items that the statute does not authorize the FTC to reveal are trade secrets and names of customers. Those limitations in no way make the statute one which explicitly forbids disclosure of all identifying details and all names of correspondence in communications received by the FTC.

The legislative history and judicial construction of Section 6(f) support this interpretation. The Senate debate on the bill which

became § 6(f) demonstrates that although the statute embodies guidelines to limit release of certain types of information at the FTC's disposal, the major thrust of the bill was to set forth what material the Commission on its own initiative *could* make public, not what it could refuse to disclose. In fact, some concern was voiced on the Senate floor that the FTC under this statute would release too much information. See 51 Cong.Rec. 12929 (1914).[4] Similarly, the analysis of § 6(f) by the court in *FTC* v. *Cinderella Career and Finishing Schools*, 131 U.S.App.D.C. 331, 404 F.2d 1308 (1968) establishes that the section was aimed at allowing publication and **[311]** that the limitations on public release set forth in the section were intended to:

> require adequate consideration and suitable weighing of any damage to private property which widespread publicity of unadjudicated charges may be calculated to produce. *Id.* at 1320–1321 (Robinson, III, J., concurring)

Accord, *Bristol-Myers Co.* v. *FTC*, 138 U.S.App.D.C. 22, 424 F.2d 935, 940 *cert. denied*, 400 U.S. 824, 91 S.Ct. 46, 27 L.Ed.2d 52 (1970).

Section 6(f) of the FTCA is thus distinguishable from other statutes which have been held to fall within the meaning of Exemption 3 of the FOIA. In *Evans* v. *Department of Transportation*, 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918, 92 S.Ct 944, 30 L.Ed.2d 788 (1972), the statute at issue provided in part:

> Any person may make written objection to the public disclosure of information * * *. Whenever such objection is made, the Board or Administration shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. 49 U.S.C. § 1504.

It is clear, and the government concedes, that 49 U.S.C. § 1504, unlike § 6(f) of the FTCA, contains an affirmative provision for exemption from disclosure. Similarly, the court in *California* v. *Richardson*, 351 F.Supp. 733 (N.D.Cal.1972), held that the withholding of records was protected by Exemption 3 of the FOIA on the basis of a statute which prohibits:

> * * * disclosure * * * of any record * * * obtained * * * by the Secretary * * * or by any officer or employee of the Department of Health, Education and Welfare * * * except as the Secretary * * * may by regulations prescribe * * * 42 U.S.C. § 1306(a).

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[4] The Senate debate included the following interchange:

Mr. SUTHERLAND. Again let me see if I understand the Senator. One of the powers given to this commission is to make public the facts that they may learn. Does the Senator think the commission may require the production of all books and papers, and so on, in order that what it discovers may be made public?

Mr. LEWIS. No; I answer the Senator. He misapprehends the purport of the bill completely if that is his idea. The matters made public in the bill relate only to those things that have been brought before the commission for one of two purposes, or aid to legislation, which would not be a matter which anyone could complain of, or to demonstrate a violation complained of as touching unfair competition. It does not allow, as I apprehend the bill, that matters may be made public without any regard to any object whatever except publicity. 51 Cong. Rec. 12929 (1914).

The unequivocal language of the statute at issue in *California* v. *Richardson, supra*, forbids disclosure of documents and is in general the converse of § 6(f) of the FTCA which authorizes release of material. In short, the statutes which have been held to fall within the exemption are the obverse of § 6(f) of the FTCA in language and intent; the cases interpreting them are not authority for the defendants' position.

The Supreme Court's recent analysis of Exemption 3 in *FAA Administrator* v. *Robertson*, 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975) did not specifically address the issue in this case and in no way undermines the result reached here. The *Robertson* court merely held that the term "specific" in Exemption 3's requirement that material be "specifically exempted * * * by statute" did not mean that:

> the exemption applies only to documents specified, *i. e.*, by naming them precisely or by describing the category in which they fall. *Id.* at 265, 95 S.Ct at 2147.

However, the inapplicability of Section 6(f) of the FTCA to Exemption 3 is not predicated on its lack of specificity, but rather on the fact that it simply is not a statute which purports to prohibit disclosure.

As indicated above, the sole area in which § 6(f) of the FTCA limits the authority of the Commission relates to disclosure of facts which consist of "trade secrets and names of customers." Thus, although § 6(f) cannot justify wholesale deletions of all names and identifying details, it does specifically exempt from disclosure those two items. Accordingly, deletions of trade secrets and names of customers, but only such deletions, are protected from disclosure by Exemption 3 of the FOIA.

B. Exemption 4

The FTC next asserts that the informant's privilege is inherent in Exemption 4 of the FOIA which protects from disclosure:

> trade secrets and commercial or financial information obtained from a [312] person and privileged or confidential. 5 U.S.C. § 552(b)(4).

An examination *in camera* of a sizeable sample of the documents in question confirms that in many instances they pertain to "trade secrets and commercial or financial information." However, it is impossible to determine on the record before us whether they are privileged or confidential.

As the court in *Bristol-Myers Co.* v. *FTC*, noted, "This provision serves the important function of protecting the privacy and the competitive position of the citizen who offers information to assist government policy makers." 424 F.2d at 938. More recently, the same court has stated:

The established tests for determining whether documents are "confidential" * * * within the meaning of Exemption 4 are that the [material] must be of the sort not customarily disclosed to the public and that disclosure * * * must not be likely to either impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information is obtained. *Pacific Architects & Eng. Inc.* v. *Renegotiation Board*, 164 U.S.App.D.C. 276, 505 F.2d 383, 384 (1974) (citations omitted).

[6–8] The agency refusing to disclose requested documents has the burden of demonstrating the applicability of a particular FOIA exemption; the Act "does not permit a bare claim of confidentiality to immunize agency files from scrutiny." *Id.* The material withheld must be shown to be "independently confidential" based on its contents, and entitled to a "reasonable expectation of privacy." *Ditlow* v. *Volpe*, 362 F.Supp. 1321, 1324 (D.D.C.1973), citing *Fisher* v. *Renegotiation Board*, 153 U.S.App.D.C. 398, 473 F.2d 109, 113 (1972); *Getman* v. *NLRB*, 146 U.S.App.D.C. 209, 450 F.2d 670, 675 (1971); *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 138 U.S. App.D.C. 147, 425 F.2d 578, 580 (1970); *M. A. Schapiro & Co.* v. *SEC*, 339 F.Supp. 467, 470–471 (D.D.C. 1972). Defendants have not remotely sustained their burden. They have failed to present a single affidavit by a member of the FTC or its staff which states the basis for concluding the documents in question are confidential or privileged. Nor has the government made any attempt to scrutinize the documents individually before blocking out identifying details. The FTC excuses its lack of proof with the bold statement that "Because these documents number in the hundreds, it would be wholly impractical to make * * * factual determinations [as to confidentiality] with regard to each." (Defendants' Reply Memorandum, May 21, 1974 at p. 9).[5] Although we recognize that a request for documents of the magnitude here saddles an agency with a substantial, time-consuming task, adherence to the FOIA's scheme requires that the job be done. The Court of Appeals for the District of Columbia analyzed the problems of proof and procedure under the Freedom of Information Act with great detail in *Vaughn* v. *Rosen*, 157 U.S.App.D.C. 340, 484 F.2d 820 (1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974) and *Cuneo* v. *Schlesinger*, 157 U.S. App.D.C. 368, 484 F.2d 1086 (1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974). As the court in *Vaughn* and *Cuneo* noted, the earlier failure of courts to require the government to justify its refusal to disclose documents in any detail encourages it to argue for the widest possible exemption from disclosure for the greatest bulk

[5] Defendants added:

"It would be wholly impracticable for the Commission to determine, with regard to each person, information such as the following: whether the person provided information in confidence * * * whether the person waived any privilege of confidentiality; whether the Congressmen had reason to protect the names of such persons or any other information that might have been relevant." Defendants' Reply Memorandum, p. 15.

of material. Moreover, since the govern[313]ment—the party opposing disclosure—is the only side capable of confidently categorizing the type of information at issue, the "traditional adversary nature of our legal system" is seriously distorted, if not altogether hamstrung. To correct these deficiencies, the court required a particularized and specific factual justification from the government for exempting information, and a system of indexing and itemizing the contested documents that would correlate statements made in the government's justification with actual portions of the material. Given the reams of documents produced for *in camera* inspection in this case it is clear that, without the detailed justification and specificity of indexing required by *Vaughn* and *Cuneo*, a trial court, although provided with so little guidance, is nevertheless left with "the burden of actually determining whether the information is as the Government describes it." *Cuneo* v. *Schlesinger*, *supra*, 484 F.2d at 1091. See, in general, *Vaughn* v. *Rosen*, *supra*, 484 at 823-28; *Cuneo* v. *Schlesinger*, *supra*, 484 F.2d at 1091–92.

A glance at a few of the FTC's deletions immediately show that many of the documents cannot reasonably be deemed confidential. For example, in a letter to Senator Moss requesting information about legislation requiring the listing of octane content, the author's name and address are blocked out. (Ex. F to Plaintiff's Supplemental Memorandum of June 4, 1974). The author's name and address in a letter to Senator Talmadge requesting a copy of an FTC staff study for use in research for a college debate topic is similarly withheld. (Ex. K to Plaintiff's Supplemental Memorandum). As one court understandably commented, "The only thing more puzzling than why Plaintiffs would want these [facts] is why Defendants refuse to disclose them." *Ditlow* v. *Volpe*, *supra*, 362 F. Supp. at 1321.

[9] Nevertheless, Mobil is entitled to these facts and any others not protected by the FOIA's exemptions. Summary judgment is therefore deferred on this issue until such time as the defendants have submitted proper documentation of their claim. The defendants are directed to classify the documents in which identifying details have been deleted to indicate which documents they assert were received in confidentiality and those which are not. The Commission is further directed to submit affidavits by knowledgeable members of the FTC or its staff which provide "particularized and specific justification" for the deletions. *Cuneo* v. *Schlesinger*, *supra*, 484 F.2d at 1092. Because of the vast numbers of documents involved, this data need not refer separately to each document. However, any categorization of documents in groups must be clearly stated and justified. See *Pacific Architects & Eng. Inc.* v. *Renegotiation Board*, *supra*, 505 F.2d at 385 for examples of the information which the defendants are required to produce.

C. Exemption 7

[10] The FTC further asserts that the deletions made are justified on the ground that the documents at issue are part of the file compiled and utilized by the FTC for an on-going investigation into the activities of the petroleum industry for possible violations of the Federal Trade Commission Act and that the identifying details in the documents are accordingly protected from disclosure by Exemption 7 of the FOIA.

It is undisputed that the FTC in fact conducted an investigation into the practices of the petroleum industry which resulted in the filing of a complaint against Mobil and other oil corporations. *In the Matter of Exxon Corporation, et al.*, FTC Docket No. 8934 (Ex. F to Complaint). The complaint is currently pending before the Commission. However, the pendency of law enforcement proceedings in and of itself does not establish the applicability of Exemption 7 to the contested deletions.

At the time the present motions were filed, Exemption 7 protected:

> investigatory files compiled for law enforcement purposes * * * 5 U.S.C. § 552(b)(7). [314] Since then Congress has amended Exemption 7 to provide in pertinent part:
>
> Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source * * * Pub.L. 93–502, 88 (Stat.1563)

Although the amendment was not enacted until November 20, 1974 to become effective ninety days later, the Supreme Court held in *NLRB* v. *Sears, Roebuck & Co.* that any decision on the applicability of Exemption 7, even on a motion filed prior to the enactment of the revised version "would have to be under the Act, as amended." *Supra*, 421 U.S. at 165, 95 S.Ct. at 1523.

Absent any supporting affidavits, it is clear that the FTC cannot sustain its burden of demonstrating that the revelation of the identifying details "would interfere with enforcement proceedings, * * * constitute [an] * * * unwarranted invasion of personal privacy, disclose the identity of an informer, or disclose investigative techniques and procedures." S.Conf.Rep.No.93–1200 at 12, U.S.Code Cong. & Admin.News, pp. 6285, 6291 (1974), quoted in *NLRB* v. *Sears, Roebuck & Co. id.* To the extent that the Commission means to argue that Exemption 7(D) as amended, ("disclose the identity of a confidential source") is applicable, it must establish that any claim of confidentiality meets the standard of Exemption 7 as explained in the Conference Report accompanying the bill:

> The substitution of the term "confidential source" in section 552(b)(7)(D) is to make clear

that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred.

Yet it taxes credulity to infer for example, that all or perhaps even most unsolicited letters of constituents to their Congressman are sent with an express or implicit belief that such communications are to remain confidential.[6]

For the reasons stated, as in the case of the Exemption 4 and issue 1B discussed above, summary judgment on the validity of the deletions of identifying details is deferred pending submission by defendants of affidavits consistent with the requirements of *Vaughn* v. *Rosen, supra; Cuneo* v. *Schlesinger, supra,* and *Pacific Architects & Eng. Inc.* v. *Renegotiation Board, supra,* setting forth facts which establish the applicability of Exemption 7.

II.

Certain Communications Between the Commission and State Agencies

On the ground that they are exempt from disclosure as intra-agency memoranda (Exemption 5) and part of active investigatory files (Exemption 7) the FTC entirely withheld two memoranda which are communications with state agencies.

A. Exemption 5

Before the Supreme Court's recent decisions in *NLRB* v. *Sears, Roebuck, supra,* and *Renegotiation Board* v. *Grumman Aircraft,* 421 U.S. 168, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975), Exemption 5, which protects intra-agency memoranda **[315]** from disclosure, was consistently interpreted to protect only materials reflecting "deliberative or policy-making process" and to require the release of:

compiled factual material or purely factual material contained in deliberative memoranda and severable from its context * * * *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 87–88, 93 S.Ct. 827, 836, 35 L.Ed.2d 119 (1973).

[11] In *NLRB* v. *Sears, Roebuck & Co.,* the Supreme Court noting that the purpose of Exemption 5 was to "prevent injury to the quality of agency decisions," stated:

[6] The Conference Report explained the meaning of the term "confidential source" in the context of exemption 7(D), as amended. However, exemption 4 also limits protection from disclosure to "trade secrets and commercial or financial information" which are "privileged or confidential." 5 U.S.C. § 552(b)(4). In submitting affidavits to the court to support their assertion of protection under exemption 4, in accordance with our instruction in the text above, the FTC should apply the Conference Report definition of confidentiality as to exemption 7 since the same term used twice in one statute should, absent evidence to the contrary, be consistently interpreted. See *Davies Warehouse Co.* v. *Bowles,* 321 U.S. 144, 149–59, 64 S.Ct. 474, 88 L.Ed. 635 (1944).

> The quality of a particular agency decision will clearly be affected by the communications received by the decisionmaker on the subject of the decisions prior to the time the decision is made. However, it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached; and therefore equally difficult to see how the quality of the decision will be affected by forced disclosure of such communications, as long as prior communications and the ingredients of the decisionmaking process are not disclosed. *Supra*, 421 U.S. at 151, 95 S.Ct. at 1517.

On the basis of this analysis, the Supreme Court distinguished between intra-agency memoranda written prior to and in connection with formulation of an agency decision—which fall within Exemption 5—and communications made after a decision is reached and designed to explain it—which are not. *Id.* at 151, n. 19, and 152, 95 S.Ct. 1504. *Accord, Renegotiation Board* v. *Grumman Aircraft, supra.*

[12] After carefully examining the memoranda *in camera*, we find that they are the communications which Exemption 5, as interpreted by the Supreme Court, does protect. The first consists of a discussion of the relationship between separate investigations by the FTC and a State Attorney General into pricing policies of major brand oil suppliers and fits the definition of a pre-decisional communication set forth in *NLRB* v. *Sears, Roebuck.* The second is a summary of an interview between a staff member of the Commission and officials of a State agency written to instruct the FTC as to the jurisdiction and decision-making process of the state agency. Much of the memorandum presents matters of opinion and policy. Parts of the memorandum merely summarize facts about the state agency, and may well be a matter of public record already. However, as the court in *Montrose Chemical Corp.* v. *Train* stated:

> Exemption 5 was intended to protect not simply deliberative material, but also the deliberative process of agencies. When a summary of factual material on the public record is prepared by the staff of an agency administrator, for his use in making a complex decision, such a summary is part of the deliberative process and is exempt from disclosure under exemption 5 of FOIA. 160 U.S.App.D.C. 270, 491 F.2d 63, 70–71 (1971)

The facts in the memorandum are presented in the context of analyzing considerations of pricing crude oil and meet the *Montrose* test. That this document summarizes the deliberative processes of a state agency as distinct from the FTC itself, does not render the exemption inapplicable. As the Supreme Court explained:

> By including *inter*-agency memoranda in Exemption 5, Congress plainly intended to permit one agency possessing decisional authority to obtain written recommendations and advice from a separate agency * * * *Renegotiation Board* v. *Grumman Aircraft, supra*, 421 U.S. at 188, 95 S.Ct. at 1502.

The rationale applies with equal force to advice received from state as well as federal agencies.

Because we have determined that the two documents are protected by Exemption 5, we do not consider the applicability of Exemption 7. **[316]**

III.

Communications Between the FTC and Other Federal Agencies

From the group of documents which contained communications between the FTC and other federal agencies, defendants withheld in whole or in part three categories of materials.

A. *Staff Memoranda*

[13] The first set of documents contains three letters written by FTC officials to staff members of other federal agencies and a FTC staff report on the petroleum industry.

Having examined the three letters *in camera*, we find that they contain matters of policy and opinion and present no facts which are severable from policy statements. Accordingly, they are exempt from disclosure under Exemption 5 of the FOIA. *EPA* v. *Mink*, *supra*.

The FTC justifies its refusal to disclose the staff report on the ground that it is protected by Exemptions 5 and 7 of the Act. Although in this instance defendants here again failed to submit affidavits to support their claim as to this report, they assert in their memorandum that the report was prepared "as part of an on-going investigation into the activities of the petroleum industry for possible violations of the Federal Trade Commission Act." (Defendants' Memorandum filed November 11, 1974, pp. 14–15) After examining the report *in camera*, we find that because it contains a close analysis of a currently pending investigation by the FTC, it is protected from disclosure under Exemption 5 as interpreted by *NLRB* v. *Sears, Roebuck & Co.*, *supra* and *Renegotiation Board* v. *Grumman Aircraft*, *supra*. (See discussion at Pt. IIA, *supra) Accord*, *Exxon Corp.* v. *FTC*, No. 1928–73 (D.D.C. August 14, 1974).

B. *Other Communications*

[14] The next set of documents consists of 84 items which defendants also contend are protected by Exemptions 5 and 7. The documents have been examined *in camera* and are accurately described by defendants as containing:

1) Memoranda reflecting the information received in oral communications between staff members of the Commission and other agencies;
2) Communications reflecting the liason between the Department of Justice and the Commission in their investigating efforts including communications requesting permission to review confidential files; and
3) Communications between the commission and other agencies exchanging information or seeking information. (Defendants' Memorandum filed April 1, 1974, p. 27)

Most of the Communications in this category contain policy discussions and opinions and accordingly fall within Exemption 5 as interpreted by *EPA* v. *Mink*, *supra*.

However, as the FTC concedes, not every one of these documents contains legal analysis or policy recommendations. (Defendants' Memorandum filed April 1, 1974, pp. 28–29). Nevertheless, the defendants argue that these communications are exempt because they are "an integral part of the Commission's procedure in evaluating and taking action on matters within its jurisdiction" and, as such "are entwined in the chain of the Commission's deliberative functions which take place prior to any agency action." *Id.* at p. 29.

[15] We disagree. As noted earlier, although in the context of Exemption 4, the applicability of an exemption must be determined on the basis of the contents of the communication itself rather than the chain of events which prompted its transmittal. *Ditlow* v. *Volpe*, *supra*, 362 F.Supp. at 1324 and cases cited therein. It is true that the Supreme Court recognized in *NLRB* v. *Sears, Roebuck* that "an understanding of the function of the documents in issue in the context of the administrative process which generated them" was crucial to a determination of the applicability of Ex[317]emption 5. *Supra*, 421 U.S. at 138, 95 S.Ct. at 1510. However, that statement was made with regard to whether documents which on their face contained opinion and policy deliberation were nevertheless subject to disclosure. In contrast, the documents requested in the category presently under discussion are devoid of opinion. As such, they do not fall within the parameters of Exemption 5.

There remains the question whether the exemption for investigatory files applies. As noted earlier, a recent amendment to the FOIA confines that exemption to limited circumstances. While it appears fairly certain that the documents in question do not pass most of the alternative tests allowed by Exemption 7 as amended, the FTC could conceivably demonstrate that disclosure of the requests for information which has been transmitted between federal agencies would, in and of itself, "interfere with enforcement proceedings" and thereby meet the standard of § 552(b) (7)(A). We therefore defer decision on this issue in order to allow defendants to compile the documents which are requests for information into one indexed category and to submit

affidavits in conformance with the standards set forth in Section IC of this memorandum to demonstrate the applicability of Exemption 7 to these documents.

C. Referrals of Complaints

[16] The FTC has blacked out the names and addresses of complainants from 61 letters which referred citizen complaints to the Department of Justice. It claims the deletions are justified under Exemptions 3, 4 and 5 of the FOIA. The Commission has also withheld names and addresses contained in letters it received from the Department of Justice and, in a limited number of cases, has refused to disclose any of the contents of some such referrals. Defendants contend that the decision to withhold these referrals is warranted by Exemption 3, 4, 5 and 7 of the Act.

Turning first to the documents that have been entirely withheld, an *in camera* inspection of this material establishes that it is protected from disclosure by Exemption 5 as interpreted by *NLRB* v. *Sears, Roebuck & Co., supra,* (see discussion at point IIA of this memorandum) because they relate to opinion and decisions involving pending investigations of oil companies and petroleum issues.

[17] As to the deletion of names and identifying details, to the extent that the complainants are customers of oil companies or related business concerns, the deletions are mandated by section 6(f) of the FTCA and consequently fall within the ambit of Exemption 3. However, a number of deletions consist of the name of Congressmen or other federal officials and are not similarly protected. Exemption 3 does not apply to such erasures. (See discussion at point IA of this memorandum) Nor can they be viewed as falling within Exemption 5 of the FOIA, since they are neither policy nor opinion. A determination as to the applicability of Exemption 4 must be deferred pending submission by defendants of affidavits which establish the basis for the FTC's conclusion that the names of people who are not "customers" and other deleted material is confidential or privileged.

The motions are disposed of as indicated above.

It is so ordered.

GIFFORD-HILL & CO., INC. v. FEDERAL TRADE COMMISSION*

Civ. A. No. 75-1033. F.T.C. Docket No. 8989.

(United States District Court, District of Columbia, January 13, 1976)

In action under the Freedom of Information Act, court held that where petitioner was seeking material in order to gain advantage in F.T.C. adversary proceedings, plaintiff was only entitled to discovery of particular F.T.C. enforcement policy materials and noted that the underlying rationale of the Freedom of Information Act was to inform the public and not to serve private litigants. With regard to non-public hearing transcripts, F.T.C. assertion that disclosure would obtrude upon trial strategy was sufficient on the facts of the case.

John D. Taurman, Washington, D.C., for plaintiff.
Robert M. Werdig, Washington, D.C., for defendant.
Before FLANNERY, *District Judge*.

MEMORANDUM

This matter comes before the court on the defendant's motion to dismiss, or, in the alternative, for summary judgment. The action arises out of plaintiff's request for documents under the Freedom of Information Act (FOIA), 5 U. S. C. § 552, *as amended*, Pub. L. No. 93-502, §§ 1-3 (November 21, 1974). The requested documents pertain to the enforcement policy of the Federal Trade Commission against vertical mergers in the cement industry, of which Gifford-Hill is a member. Pursuant to guidelines set forth in its *Economic Report on Vertical Integration in the Cement Industry* and its *Enforcement Policy With Respect to Vertical Mergers in the Cement Industry*, the FTC filed a complaint against Gifford-Hill in August, 1974 (FTC Docket No. 8989). Proceedings now are pending before an administrative law judge of the Commission. In December, 1974, plaintiff filed with the Commission a request to inspect and copy documents under FOIA, and reinstituted its request after the effective date of the 1975 amendments, in order to obtain more expeditious treatment under the Act. The Commission took final action in April, 1975, disclosing a number of records, but withholding certain of the requested documents, and the plaintiff instituted this action in June.

Records Not Within the File of Docket No. 8989.

On November 25, 1975, this court ordered *in camera* inspection of the documents on pages 2-54 and 83 of the Commission's Index of

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶60,674 at 67,942 (1975-2 Trade Cases). For case before the Commission, see 88 F.T.C. 440.

Documents Withheld, submitted in conjunction with its motion to dismiss or for summary judgment. The court also ordered a supplemental justification for withholding documents listed at pages 66-80 and 84-86 of the Index. In its opposition to the defendant's motion, and in its Further Partial Abandonment of Request Under Freedom of Information Act, plaintiffs abandoned its request for certain documents listed at pages 2-27 of the Index, all documents at pages 55-65 and 81-82, testimony taken in non-public hearings of May 4, 1973 described at page 66, subpoenas *ad testificandum* listed at page 67, and certain other documents listed at pages 79 and 85 of the Index.

The documents inspected by the court *in camera* are all those documents enumerated in the Index that remain in contention and are not within the investigatory file of Docket No. 8989, but concern the preparation and implementation of the Commission's general enforcement policy. The Commission has asserted only Exemption 5 (5 U. S. C. § 552(b)(5)) with respect to these documents. After inspection of all the documents submitted, and for the reasons stated below, the court is of the opinion that the following documents, in whole or in part as indicated, do not fall within the protection of Exemption 5. The documents are listed by page and item number. Parentheticals following certain documents indicate the portion of the document that is to be disclosed. The remainder of each such document was found to be exempt. The Commission must disclose the documents as follows:

2,3; 4,4; 7,3 (last two paragraphs); 7,4 (last paragraph); 7,5; 7,6; 9,2; 11,4; 12,5; 13,2 (fourth paragraph); 13,3 (third and fourth paragraph); 14,3 (last paragraph); 14,4 (last paragraph); 15,1 (last two paragraphs); 15,2 (last two paragraphs); 15,3 (last three paragraphs); 16,2 (last two paragraphs); 16,3 (last paragraph); 16,4; 16,6; 17,3 through 17,6; 17,7 (last paragraph); 17,8; 20,5 (last three paragraphs); 20,6 through 20,8; 21,1; 21,3 through 21,7; 22,5 through 22,7; 24,2 (last paragraph); 24,4; 24,5; 24,8; 25,2; and 25,3.

The purpose of Exemption 5 is to allow the agency and its staff the freedom to express their opinions and to prevent the premature disclosure of an agency decision. *See EPA* v. *Mink*, 410 U. S. 73, 87 (1973). Documents "which reflect the agency's group thinking in the process of working out its policy and determining what its law ought to be" are properly withheld under Exemption 5. However, opinions and interpretations which embody the agency's law and policy should be disclosed, *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 152-53 (1975). In *Sears* the Supreme Court ruled that Exemption 5 never can apply to records which relate the "final disposition" of matters by the agency, "as long as prior communications and ingredients of the decision-making process are not disclosed." 421 U. S. 151–53. For this reason, Exemption 5 does not apply to those memoranda which conclude that

no complaint should be filed by the agency, since the memorandum effects a "final disposition", while the Exemption does apply to records which direct the filing of a complaint, since the enforcement process is only beginning. *Id.* at 155, 159.

Similar reasoning can be applied to the instant case. While most of the documents ordered to be disclosed are themselves part of an ongoing program to instill competition in the cement and ready-mix concrete industry, each such document relates to a final disposition within that program. Records which indicate final action on acquisition and compliance matters as a part of the policy concerning vertical integration are not exempt from disclosure. For example, Item 5 on Page 7 of the Index of Documents Withheld relates the Commission's decision not to pursue compliance actions against respondents named in the document. The "reports of compliance" mentioned in the document, which most likely are internal working memoranda, will not be revealed by the document at issue. Disclosure will reveal only the conclusion of the Commission with respect to these respondents. Since the conclusion is that no action is to be taken, it constitutes a final disposition within the meaning of the *Sears* case, and is not protected by Exemption 5.

As another example, Item 2 on Page 15 of the Index contains information in its first five paragraphs that reflects the thought processes of the Commission, but the last two paragraphs clearly represent the ultimate decision on a policy of the Commission that is of substantial public interest. Such information, when severable from the rest of the document, should be disclosed.[1] For the documents in the first 27 pages of the Index, the Commission has made no apparent attempt to sever out this kind of material. As indicated by the documents that have been ordered to be disclosed in part, this is a breach of the Commission's statutory obligation. 5 U. S. C. §§ 552(a)(4)(B), 552(b). In this case, the court has undertaken to remedy this failure by way of *in camera* inspection of each document submitted. The court is of the belief that this is not the preferable procedure by which to resolve disputes under the Freedom of Information Act. In the future, the Commission, or any agency, should be held to a stronger burden on the issue of severability than was met in this case with respect to the documents submitted *in camera*, or risk disclosure of the records at issue.

The documents listed at pages 28 through 54 and at page 83 of the Index are exempt from disclosure. The Commission circulations and assignment sheets as a whole reflect the internal processes of the

[1] The fact that the material may be otherwise in the public domain is not a valid reason for non-disclosure. The reasoning of *Montrose Chemical Corp. v. Train*, 491 F. 2d 63 (D. C. Cir. 1974), where a staff summary of evidence introduced at a public hearing was held exempt, does not apply to the facts of this case.

Commission, and thus fall within Exemption 5. While each document in itself may reveal only a minute part of the Commission's operations, so that the prospect of disclosure would not necessarily inhibit circulation of that particular document, disclosure of the group would improperly infringe upon the policy-making processes of the agency in a manner not intended to be the consequence of disclosure under FOIA.

The documents at pages 50-54 are intra-agency memoranda that clearly are of the type protected by Exemption 5. They include preliminary recommendations and suggestions concerning the anti-trust enforcement program directed at the cement industry. Upon review by the court, there appears to be no material in these memoranda that could be deleted to render the remainder disclosable. The reasoning is interwoven in the documents to make each a unit not readily amenable to deletion.

Pertaining to Exemption 5, the plaintiff also contends that the "secret agency law" exception to Exemption 5, as developed in *American Mail Line Ltd.* v. *Gulick*, 411 F. 2d 696 (D.C. Cir. 1969), and *Sterling Drug, Inc.* v. *FTC*, 450 F. 2d 698 (D. C. Cir. 1971), should be applied to this case. None of the documents inspected *in camera* contain material that can be classified as the undisclosed basis for an agency decision that should be revealed under the policies of the Act. Nor is there any indication that the Commission primarily relied on an undisclosed document listed in the Index under the section dealing with records in the file of Docket No. 8989 for any policy, without otherwise articulating the reasons for the policy. The material in the memoranda and minutes may have been "filtered and refined by the Commission, with the result that its ultimate decision was something more than, or at least different from, the sum of its 'parts' ". This does not make the documents disclosable under the secret law exception. *Sterling Drug, Inc.* v. *FTC, supra*, at 706.

Documents Within the File of Docket No. 8989.

The documents listed at pages 66 through 85 of the Index of Documents Withheld, exclusive of the assignment sheets at page 83, were not inspected *in camera*. Upon review of the Commission's Index and Supplemental Justification, the following action is deemed appropriate.

A. Documents to be disclosed: (1) Subpoenas *duces tecum* at page 67 of the Index. Names and addresses of confidential sources may be deleted; (2) Item 1 on Page 80.

B. Documents to be submitted for *in camera* inspection: 77,3; 77,4; 78,1 through 78,5; 78,7; 79,1 through 79,5; 79,7; 79,8; and all documents listed at pages 84 through 86 of the Index.

C. The Commission also shall submit a further supplemental

justification regarding non-disclosure under Exemption 4 in accordance with the standards set forth in *Pacific Architects and Engineers* v. *Renegotiation Board*, 505 F. 2d 383 (D. C. Cir. 1974), together with a supplemental justification for failure to disclose with deletion of confidential sources under Exemption 7D. This latter justification also shall be forthcoming as to Items 7 and 8 of page 79, for which the Commission asserts only Exemption 7D.

The Commission claims under Exemption 7A that disclosure of the testimony, at Index page 66, of the non-public investigational hearings would interfere with the active enforcement proceedings against Gifford-Hill. The original justification in this regard, submitted along with the Index, was so conclusory as to require the submission of a supplemental justification to comply with the statutory requirement of the 1975 amendments of the Freedom of Information Act. The language of the new Exemption 7 (5 U. S. C. § 552(b)(7)) and the legislative history make clear that the showing to justify non-disclosure no longer may amount to an assertion that the records are in an agency's investigatory file. See 120 Cong. Rec. S17828 (daily ed. October 1, 1974) (remarks of Senator Kennedy). However, while a specific showing of harm now is a requirement, the legislative debates indicate that the sponsors of the amendment really were not attempting to create a substantially revised administrative burden, but merely were seeking to clarify the language of the old statute, which had been construed to offer protection whenever the agency made the simple assertion that the requested documents were within an investigatory file. See 120 Cong. Rec. S9330 (daily ed. May 30, 1974) (remarks of Senator Hart). Now, when the agency demonstrates interference with "a concrete prospective law enforcement proceeding" the burden to justify non-disclosure under Exemption 7A has been satisfied. Rather than being directly aimed at achieving greater disclosure, the amendment to Exemption 7A "explicitly places the burden of non-disclosure on the Government," resulting in disclosure only if the Government fails to meet that burden. See *id.*

In the instant case, the Commission contends that disclosure of the non-public hearing transcripts will interfere with its "trial strategy", because the probable order and wording of its questions to witnesses will be revealed, and Gifford-Hill will be facilitated in confronting adverse witnesses. This specific justification is not particularly compelling, but is sufficient on the facts of this case. First of all, it should be noted that the Freedom of Information Act was fundamentally designed to inform the public and not to benefit private litigants. *NLRB* v. *Sears, Roebuck & Co., supra*, at 143 n. 10. Gifford-Hill is seeking the transcripts for its own benefit to gain advantage in the Commission's adversary proceedings. While this effort should not be

disparaged, the court should not readily sanction the use of the Act as a tool to tip the strategic balance of an administrative proceeding when the party seeking disclosure is engaged in litigation over the policy which is the subject matter of the records requested under FOIA. In this context, the claim of interference to the Commission's trial strategy should carry some weight. If the requesting party were a member of the public other than the object of the investigation that will result in enforcement proceedings, then the burden on the Government could be more extensive, requiring a demonstration that the investigation actually will culminate in an adversary proceeding, and that premature disclosure would cause some positive harm to the government's case, other than the loss of relative strategic advantage in the interrogation of the complainant's own witnesses.

Gifford-Hill already has obtained through the administrative discovery process a list of the witnesses the Commission proposes to call and documentary exhibits it proposes to introduce. By Gifford-Hill's own representation, it will receive copies of the transcripts in question prior to the testimony of each witness concerned. This should provide Gifford-Hill with adequate opportunity for effective confrontation and cross-examination. To grant the plaintiff earlier access to the transcripts under FOIA would undermine the Commission's obviously fair discovery process, and to allow a private litigant, who is the object of a complaint before the Commission, to gain adversary advantage by means of this action simply would not fulfill the interests of informing the public contemplated by the Act. In this light the Commission's justification is sufficient.

The subpoenas *duces tecum* at page 67 of the Index, should be disclosed, with deletion of the names and addresses of confidential sources because the Commission has properly asserted Exemption 7D (protection of confidential sources) only to the extent of the material ordered to be deleted, and has offered no specific justification to warrant non-disclosure under Exemption 7A. In its review of the Commission's Supplemental Justification, the court can find no attempt to demonstrate how release of the subpoenas with deletions will interfere with the proceedings before the Administrative Law Judge scheduled for July, 1976. Thus, the Commission has not met its burden under Exemption 7A, nor has it specifically demonstrated that further deletions are required, and the records must be disclosed.

The records at pages 65 through 74 of the Index for which the Commission asserts Exemption 5 are nondisclosable under that exemption. The Index provides adequate information to the court that the internal memoranda contain discussion of a wide range of policies and decisions in their incubation stage. *In camera* inspection for possible deletions is not called for because the discursive nature of the

memoranda renders the segregability of the documents so unlikely that the Index should be deemed sufficient for this purpose. The records listed at page 76 also are exempt for this reason.

The remaining documents at page 74 and the documents at page 75 of the Index are exempt under Exemption 7A. Together with the information supplied in the Index, the Commission has supplied a sufficient basis to find that their release would interfere with the pending enforcement proceeding against Gifford-Hill.

The Commission asserts Exemption 4 for certain documents at pages 77 through 79 of the Index, and for all documents at pages 84 through 86. While the Commission has supplied a fairly detailed description of each type of document, it has failed to meet the burden of justification set forth in *Pacific Architects & Engineers* v. *Renegotiation Board*, 505 F. 2d 383 (D. C. Cir. 1974). As stated in that case a "detailed justification" should include

> (a) the extent to which data of the sort in dispute is customarily disclosed to the public, with specific factual or evidentiary material to support the conclusion reached; (b) the extent to which disclosure will impair the government's ability to obtain necessary information of this type in the future, with specific factual or evidentiary material to support the conclusion reached; (c) the extent to which disclosure of the information will cause substantial harm to the competitive position of the person from whom the information was obtained; with specific factual or evidentiary material to support the conclusion reached; and (d) the extent to which any of the harms of the type mentioned in (b) and (c) could be reduced or eliminated by non-disclosure of the identity of the person submitting the information in dispute. *Id.* at 385.

The court cannot properly review the issues presented under Exemption 4 without this information. As to the documents at pages 84 through 86 of the Index, the Commission has demonstrated an attempt to sever out certain information and disclose the remainder. However, there is no indication, and certainly not "specific factual or evidentiary material" bearing on the extent to which this type of information is disclosed to the public, or the competitive harm that would be inflicted by release of certain of the records. Without this information, the court cannot effectively rule upon the propriety of exempting the records from disclosure. For the records from pages 77 through 79, the Commission's supplemental justification does provide some indication of the competitive harm that smaller competitors within the cement industry would suffer by disclosure, but the statements are conclusory, not containing the detail required by the standard of *Pacific Architects*.

These documents for which the Commission asserts Exemption 4 also are to be submitted *in camera*. If the court finds that the justification for non-disclosure is insufficient, it will inspect the documents to

determine whether release in full or release with deletions to protect confidential sources under Exemption 7D is appropriate.

Items 7 and 8 at page 79 of the Index are to be submitted for *in camera* inspection. Only Exemption 7D has been asserted, and the Commission has not made an adequate effort to demonstrate why the documents could not be released with deletions. As to these documents, the Commission should submit a further supplemental justification to support total non-disclosure. Items 1 and 2 at page 77 and Item 6 at page 78 were not considered to fall into the same category as Items 7 and 8 at page 79 because in its supplemental justification the Commission argued that release would cause interference with enforcement proceedings pursuant to Exemption 7A. Although this exemption is not specified in the Index, the information set forth in the Index describing each set of documents, and the contention by the Commission in its supplemental justification relating to the inhibiting effect of disclosure upon the sources is sufficient to warrant nondisclosure.

Item 1 at page 80 is to be disclosed. The only exemption originally relied upon by the Commission was Exemption 7C. Since the Commission abandoned its reliance on this exemption in its supplemental justification, there is no longer any reason to prevent disclosure.

Finally, upon inspection of the documents that were submitted *in camera*, it became apparent that documents 12,1; 14,6; 18,5; and 27,7 were not submitted. The Commission should attempt to retrieve these documents for inspection by the court.

UNITED STATES OF AMERICA v. AMREP CORPORATION et al.*

No. 75 Cr. 1023 (CMM). F.T.C. Docket No. 9018.

(United States District Court, Southern District of New York, January 15, 1976)

1. PREVENTING INTERFERENCE WITH DEFENDANTS' PREPARATION AND PENDING CRIMINAL TRIAL WAS WITHIN COURT'S JURISDICTION DESPITE ITS LACK OR JURISDICTION TO INTERFERE WITH F.T.C. PROCEEDINGS.

As against contention that district court lacked jurisdiction to interfere with proceedings of Federal Trade Commission, court did have jurisdiction to prevent interference with trial of pending indictment with preparation by defendants for such trial.

2. ADMINISTRATIVE REMEDIES HAD BEEN EXHAUSTED WHERE F.T.C., KNOWING OF CRIMINAL INVESTIGATION, HAD DENIED STAY OF PROCEEDINGS.

Where full Federal Trade Commission had denied stay of proceedings knowing of criminal investigation then in progress, there was exhaustion of administrative remedies.

3. COMPLIANCE WITH A.L.J. ORDER WAS UNNECESSARY BEFORE SEEKING A FEDERAL DISTRICT COURT STAY, WHERE DEFENDANTS HAD PETITIONED A.L.J. FOR STAY TO PREVENT DISCOVERY PROCEEDINGS AND HE WOULD NOT RULE PRIOR TO COMMENCEMENT OF DOCUMENT PRODUCTION.

Where it was to prevent commencement of discovery proceedings that application to administrative law judge for stay was initiated, and he indicated he would not rule at least until production of documents had commenced, movant was not required to comply with order of administrative law judge before seeking stay from federal district court.

4. IN SEEKING STAY OF ADMINSTRATIVE PROCEEDINGS, BURDEN OF SHOWING THAT SCHEDULE OF F.T.C. PROCEEDINGS WOULD INTERFERE WITH DEFENSE PREPARATION OR TRIAL OF INDICTMENT RESTED WITH DEFENDANTS.

[1094] Defendant in criminal prosecution, seeking stay of administrative proceedings, had burden of making sufficient showing that schedule of proceeding before Federal Trade Commission would interfere with trial of indictment or preparation of defense.

5. F.T.C. PROCEEDINGS WOULD BE STAYED UNTIL ONE MONTH FOLLOWING ENTRY OF JURY VERDICT IN CRIMINAL TRIAL TO ENABLE DEFENDANTS TO PREPARE THEIR DEFENSE.

To enable defendants to prepare defense for criminal trial schedule to start October 5, civil proceedings before Federal Trade Commission would be stayed after July 30, 1976, until one month after entry of jury's verdict in criminal trial.

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* Reported in 405 F.Supp. 1053 (1976).

(Syllabus, with substituted captions, taken from 405 F.Supp. 1053)

In petition for stay of F.T.C. proceedings, court held that after July 30, 1976, civil proceedings would be stayed until one month following entry of jury's verdict in the criminal trial scheduled for October 5, so as to allow defendants to prepare their defense.

Civil proceedings stayed accordingly.

Thomas J. Cahill, U.S. Atty., Southern District of New York, New York City, for the United States; *Naomi Reice Buchwald*, Asst. U.S. Atty., New York City, of counsel.

Proskauer, Rose, Goetz & Mendelsohn, New York City, for defendant Amrep Corporation; *Morton M. Maneker*, New York City, of counsel.

Before METZNER, *District Judge*.

[1054] Amrep Corporation (Amrep), a defendant in this criminal proceeding, moves for a stay of all proceedings presently pending against it before the Federal Trade Commission (the Commission).

The indictment names seven individual and three corporate defendants and charges, in essence, a conspiracy to defraud purchasers of lots in Rio Rancho Estates in an amount exceeding $200,000,000. It consists of 42 pages alleging 70 violations of the mail fraud statute (18 U.S.C. § 1341), and ten counts of violation of the Interstate Land Sales Full Disclosure Act (15 U.S.C. § 1703).

Amrep is also the subject of a complaint filed by the Commission based on the same and similar acts. The Commission commenced its investigation in April 1973. In March 1975 it issued a complaint against Amrep seeking extensive relief in the form of a detailed cease and desist order and contemplating massive restitution to allegedly defrauded purchasers.

In March 1974 the United States Attorney instituted a grand jury investigation and the instant indictment was filed on October 28, 1975, to which all the defendants pleaded not guilty on November 10, 1975.

Between the issuance of the Commission's complaint and the filing of the indictment, the Commission had been proceeding with discovery of Amrep. On October 30, two days after the filing of the indictment, a conference was held with the administrative law judge for the purpose of setting a trial schedule of the Commission's complaint. Although the administrative law judge was informed of the filing of the indictment, he proceeded to schedule, by order dated October 31, the following pretrial and trial proceedings: (1) By November 28, Amrep was to have supplied the Commission with additional document production in order to fully comply with a government subpoena duces tecum. (2) The Commission's case-in-chief was to begin February 17, 1976. (It was adduced at the hearing of October 30 that the Commission's case would

last at least some thirteen weeks, taking place in seven different cities.) (3) Amrep's defense was to commence six weeks after the close of the case-in-chief.

On November 18, 1975, eight days after the defendants had pleaded to the indictment, this court held a pretrial conference. It was not advised at the time of the pendency of the Commission's proceedings. The court announced that it was ready to proceed with the trial of this case as soon as it finished a six-weeks SEC criminal fraud case in the middle of March of this year. At the conference the conclusion was reached, both from the remarks of counsel for the government and the six counsel representing various defendants, that the pretrial motions could not be finally submitted to the court until March 15. A great deal of discovery was going to be involved since many thousands of documents had been brought before the **[1055]** grand jury which had considered the matter for 18 months. It also became apparent that the case would take three to four months to try. Allowing sufficient time for the disposition of the motions, which the government opined would be complicated, and whatever discovery would be permitted, it was obvious that the trial could not commence much before the middle of May. Such a schedule would require the court to inform prospective jurors that they could not expect a vacation during the summer of 1976 since they would be engaged in this trial during the months of July and August. The time necessary to empanel twelve jurors and six alternates would have been inordinately long under the circumstances. As a result, the court set the case down for trial on October 5, 1976. At the same time, it fixed January 23 as the date for filing all motions by the defendants and acceded to the government's request that it have until March 15 to answer the motions.

Amrep had been represented by its general counsel in the Commission proceedings. However, when he was named as a defendant in the indictment, Amrep retained new counsel in those proceedings, which was the same firm of attorneys which it had chosen to represent it against the charges in the indictment. Counsel then requested a one-month extension of the schedule previously set for the Commission proceedings.

By order of December 2, 1975, the administrative law judge amended the order of October 31 by ruling, *inter alia*, that the additional production required of Amrep now would commence on January 9, 1976, that 864 requests to Amrep for admissions served on November 12, 1975 would be answered by January 16, 1976, and that the government's case-in-chief would commence on March 29, 1976. The order also provided that Amrep could move to stay all Commission proceedings by December 19, 1975, in view of its representations of

conflict between those proceedings and the trial schedule in the criminal action.

Amrep made the motion for a stay on December 19, claiming that its principal officers through whom it would appear in the Commission's proceedings would be tied up in preparing their defense to the criminal charges. Amrep also requested an immediate stay of the production scheduled for January 9. The administrative law judge responded on December 29 by directing that the discovery schedule would be adhered to and that either on January 9, or shortly thereafter, he would pass upon the application for a stay. Amrep decided at that time to seek relief from the Commission's order by this motion.

[1] At the outset, the Commission argues that this court lacks jurisdiction to interfere with its proceedings. I think it is perfectly clear that the court does have jurisdiction to prevent interference with the trial of the pending indictment or with the preparation by defendants for such trial. *United States* v. *Simon*, 373 F.2d 649 (2d Cir.), *vacated on other grounds*, 389 U.S. 425, 88 S.Ct. 577, 19 L.Ed.2d 653 (1967); *United States* v. *Birrell*, 276 F.Supp. 798 (S.D.N.Y.1967).

[2,3] I also hold that Amrep has exhausted its administrative remedies. The full Commission on a previous application had denied a stay of the proceedings, knowing of the criminal investigation then in progress, and it would appear to be a futile gesture to compel Amrep to go through the same application a second time. *Sohm* v. *Fowler*, 124 U.S.App.D.C. 382, 365 F.2d 915 (1966); *cf. Bannercraft Clothing Co.* v. *Renegotiation Board*, 151 U.S.App.D.C. 174, 466 F.2d 345 (1972). Secondly, the administrative law judge had directed that Amrep proceed with its production of documents on January 9, and that sometime, either on that day or later on, he would make his ruling as to staying the proceedings. It was to prevent the commencement of the discovery proceedings that the application for a stay to the administrative law judge was initiated. Since he indicated he would not rule **[1056]** at least until production of documents had commenced, Amrep should not be prevented from obtaining a ruling on the fundamental question before it was called upon to comply with the order of the administrative law judge.

[4] Consequently, the issue to be decided here is whether Amrep has made sufficient showing that the schedule of the proceedings before the Commission will interfere with the trial of the indictment or the preparation of its defenses. The burden on the issue rests upon Amrep.

Since Amrep is a corporation, its defenses will be presented through its principal officers, directors and general counsel, all of whom are named as defendants in the indictment.

On the oral argument, Amrep spelled out three reasons why its application should be granted. First, it argued that a fair trial of the

criminal charges could not be had if, during the entire period, the corporation and its officers are forced to be involved in the Commission proceedings. Second, it argued that a fair trial cannot be afforded Amrep because the Commission proceedings will in effect afford the government pretrial discovery to which it is not entitled by the rules of criminal procedure and for which Amrep does not have reciprocal rights. Third, it contended that the Commission proceedings will not be jeopardized by an adjournment until after the completion of the criminal trial.

As stated above, the defendants must file all pretrial motions in the criminal proceeding within ten days from now. Counsel have been working on those motions for nearly two months and I cannot conceive that all of the individual defendants are going to be so tied up in the next two weeks that they cannot comply with the directives in the Commission proceedings during that period, especially in view of the adjournments of the existing dates which will have to be granted because of the temporary stay ordered by this court. After the defendants' motions are filed, there will be seven weeks in which day-to-day work will not be necessary awaiting the government's answers, and several weeks thereafter awaiting decision on those motions and such discovery as the court may permit. Thus, there is no substantial conflict through the first month of the projected trial schedule of the government's case-in-chief before the administrative law judge.

While a large number of witnesses have been designated to be called by the government in the Commission proceeding, the aid of all of the individual defendants will not be necessary to prepare the cross examination of such witnesses.

[5] Consequently, I see no reason to interfere with the schedule set up by the administrative law judge through the completion of the government's case-in-chief, assuming that it ends on schedule or shortly thereafter. What does concern me however, is the involvement of the individual defendants in the preparation and presentation of Amrep's defense in the Commission proceedings during the months of August, September and October, as the criminal trial is scheduled to start on October 5. Those will be the months when Amrep will require them to be intimately involved with counsel in the preparation of its defense of the criminal charges.

Therefore, I direct that the Commission proceedings may continue with the presentation of the government's case-in-chief through July 30, 1976. All proceedings thereafter are stayed until one month after the entry of the jury's verdict in the criminal trial.

The Commission's investigation started in April 1973, but nothing appears to have been done for nine months prior to the filing of the complaint in March 1975. This order will result in a delay of several

months in the completion of the Commission proceedings, but that does not seem to be prejudicial in view of the time that the matter has taken to date. The Commission, if it is of the opinion that it would be prejudiced by an adjournment, can apply for a preliminary injunction against Amrep to cease what[1057]ever practices the Commission seeks to enjoin in the proceedings.

The adjournment also avoids, in the main, the divulging of Amreps position in the criminal case through indirect pretrial discovery by the government. While this results from the order, I add that it is not a basis for the ruling on this motion. *But see Silver* v. *McCamey*, 95 U.S.App.D.C. 318, 221 F.2d 873 (1955).

So ordered.

FEDDERS CORP. v. FEDERAL TRADE COMMISSION*

No. 104, Docket 75–4051. F.T.C. Docket 8932.

(United States Court of Appeals, Second Circuit, January 21, 1976)

1. POWER TO ENJOIN "LIKE AND RELATED PRACTICES" TO CONDEMNED ONES IS WITHIN THE DISCRETION OF F.T.C.

Federal Trade Commission has the power, within its discretion, to enjoin "like and related acts" to the one condemned.

2. COURTS SHOULD NOT EASILY ELECT TO MODIFY F.T.C. ORDERS SINCE CONGRESS ASSIGNED F.T.C. THE BASIC RESPONSIBILITY FOR FORMULATING THEM.

[1399] Congress has placed primary responsibility for fashioning orders on the Federal Trade Commission and, hence, courts should not lightly choose to modify the Commission's orders.

3. REMEDIAL ORDER SHOULD BE UPHELD WHERE IT IS REASONABLY RELATED TO EXISTING UNLAWFUL PRACTICES.

So long as Federal Trade Commission's remedial order is reasonably related to the unlawful practices found to exist the order should be upheld.

4. THE NARROWING OF DECEPTIVE ADVERTISING ORDERS SO THAT THEY MORE CLOSELY RELATE TO OFFENDING CONDUCT WHILE STILL ADEQUATELY PROHIBITING VARIATIONS ON THE PRIMARY SCENE, IS REQUIRED BY OVERALL CONCEPT OF "REASONABLENESS."

Overall concept of "reasonableness" has required the narrowing of deceptive advertising orders so that they more closely relate to the offending conduct while still sufficiently prohibiting variations on the basic scene.

5. A MORE SPECIFIC ORDER THAN THAT REQUIRED PREVIOUSLY MAY BE NECESSITATED BY STIFF PENALTY PROCEDURES ESTABLISHED IN 1959 AMENDMENT TO F.T.C. ACT.

Stiff penalty procedures established by 1959 amendment to Federal Trade Commission Act may require a more specific and precise order than would have been necessary prior to enactment of those penalties.

6. REQUIREMENT THAT MANUFACTURER CEASE CLAIMING UNIQUENESS OF HIS PRODUCT BASED ON SPURIOUS CLAIM THAT PRODUCT POSSESSED "RESERVE COOLING POWER" WAS REASONABLE.

Ordering air conditioner manufacturer to cease and desist from making claims that its air conditioners were unique in any material respect, unless such was the fact, was reasonably related to the spurious claim that the conditioners were unique in that they possessed a "reserve cooling power."

7. REQUIREMENT THAT MANUFACTURER CEASE MAKING UNSUBSTANTIATED CLAIMS RELATIVE TO CERTAIN CHARACTERISTICS, CAPACITIES OR CAPABILITIES WAS REASONABLY RELATED TO CLAIMS OF UNIQUENESS.

Order forbidding air conditioner manufacturer from making any advertising claim as to the "air cooling, dehumidification, or circulation characteristics,

* Reported in 529 F.2d 1398 (1976) *cert. denied* 429 U.S. 818 (1976). For case before the Commission, see 85 F.T.C. 38.

capacity or capabilities of any air conditioner" unless substantiated was reasonably related to manufacturer's misrepresentations that its air conditioners were unique because they had "reserve cooling power."

8. COURTS MUST GIVE F.T.C. FINDINGS GREAT WEIGHT.

What constitutes deception in advertising is a matter falling within the realm of the Federal Trade Commission's greatest expertise; as such a reviewing court must give the Commission's findings great weight.

9. ORDER REQUIRING MANUFACTURER TO CEASE MAKING CLAIMS THAT ITS UNITS WERE UNIQUE WAS REASONABLE BASED ON FINDINGS.

In view of finding that air-conditioning equipment manufacturer's unsubstantiated claim that its product were unique because they had "reserve cooling power," implied to consumers a claim of high cooling performance in extreme conditions of heat and humidity, it was reasonable to order manufacturer to cease and desist from making claims that its units were unique in any material respect unless such was the fact and forbid it from making advertising claims as to cooling, dehumidification, or circulation characteristics, capacity or capabilities, unless such claims were substantiated.

10. WHERE PUBLIC INTEREST REQUIRES IT, ISSUANCE OF CEASE AND DESIST ORDER IS NOT BARRED BY PRIOR DISCONTINUANCE OF OFFENSIVE PRACTICE.

Fact that an advertiser may have discontinued the offending practice before the Federal Trade Commission issued a complaint does not bar a cease-and-desist order where the public interest otherwise requires it.

11. DISCONTINUANCE OF DECEPTIVE ADVERTISING PRIOR TO FILING OF COMPLAINT AND WRITTEN ASSURANCE OF MANUFACTURER NOT TO RESUME PRACTICES DID NOT PRECLUDE ISSUANCE OF CEASE AND DESIST ORDER.

Fact that deceptive advertising that air-conditioning units were unique because they had "reserve cooling power" was discontinued prior to filing of Federal Trade Commission's complaint and was combined with manufacturer's written assurances that it would not again resume such advertising did not preclude issuance of cease-and-desist order where [1400] the offending term had been used in advertising for six or seven years, such claims were described in distributors' bulletin as "old powerful selling friends" and discontinuance was not a voluntary action.

12. ORDER REQUIRING CESSATION OF UNIQUENESS CLAIMS WAS NOT OVERLY BROAD WHERE IT PROHIBITED OBJECTIVE REPRESENTATIONS AS WELL AS SUBJECTIVE PRODUCT CLAIMS: UNCERTAINTY COULD BE RESOLVED BY PETITIONING FOR CLARIFICATION OF ORDER'S SCOPE.

Order requiring manufacturer of air-conditioning units to cease and desist from claiming that its units were unique in any material respect unless such was the fact was not overly broad on ground that it was not, by its terms, limited to objective representations of uniqueness but also prohibited subjective product claims since order did not intend any such restrictions for it was only the claim which fairly, if not necessarily, implied some underlying objective basis which the order reached; any uncertainty in application could be resolved by petitioning the agency as to whether prospective advertising claims came within the scope of the order.

(Syllabus, with substituted captions, was taken from 529 F.2d 1398)

On petition to review F.T.C. cease and desist order, court held that order was not unreasonable in view of finding that assertions of

uniqueness as to "reserve cooling power" implied to consumers a claim of high performance in extreme conditions of heat and humidity; and order was not overly broad on ground that it was not limited to objective representations of uniqueness characteristics but also prohibited subjective product claims.

Petition dismissed.

Sydney B. Wertheimer, New York City (*Jeffrey H. Schneider, Weisman, Celler, Spett, Modlin & Wertheimer*, New York City, of counsel), for petitioner.

Denis E. Hynes, Atty., Federal Trade Commission (*Robert J. Lewis*, Gen. Counsel, *Gerald Harwood*, Asst. Gen. Counsel, Federal Trade Commission, of counsel), for respondent.

Before, MULLIGAN, OAKES and MESKILL, *Circuit Judges*.

OAKES, *Circuit Judge:*

Petitioner seeks review of a final order entered against it by the Federal Trade Commission. The order stems from an investigation and determination by the Commission that petitioner has made serious misrepresentations in the advertising claims it has used to promote sales of its air conditioning equipment. Specifically, the Commission found that Fedders has claimed in its advertising that its air conditioners are unique, because they have "reserve cooling power," a term which the parties agree was intended to imply an unusual ability to produce cold air under extreme conditions of heat and humidity. In fact, however, the Fedders conditioners had no objective technical advantage over the equipment manufactured by its competitors. Accordingly, the Commission concluded that petitioner was engaging in misrepresentations in its advertising in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).[1] A cease and desist order was entered by the Commission which prohibits Fedders from:[2]

> 1. Representing, directly or by implication, that any air conditioner, on the basis of a comparison thereof with the air conditioners of other manufacturers then being marketed in the United States in commercial quantities, is unique in any material respect, unless such is the fact;
>
> 2. Making, directly or indirectly, any statement or representation in any

[1] 15 U.S.C. § 45 provides in pertinent part:

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * * * * * *

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

[2] Other provisions of the Commission's order require the petitioner to maintain records available for FTC staff inspection which show the documentary materials in support of any claim disseminated in Fedders advertising concerning "the air cooling, dehumidification, or circulation characteristics, capacity, or capability of, or the uniqueness of any feature of, any of respondent's air conditioners." The order was issued on January 14, 1975, and is to be in effect for a period of ten years.

> advertising or sales promotional material as to the air cooling, dehumidification, or circulation characteristics, ca[1401]pacity or capabilities of any air conditioner, unless at the time of such representation respondent has a reasonable basis for such statement or representation, which shall consist of competent scientific, engineering or other similar objective material or industry-wide standards based on such material. * * *

Review is sought here under 15 U.S.C. § 45(c).

[1] Fedders does not challenge the Commission's finding that Fedders' advertising involved misrepresentations.[3] Instead, it contends that the Commission's order is impermissibly broad in that it prohibits practices which are not sufficiently related to the unlawful practice actually found by the Commission and that these practices are, therefore, outside the proper scope of the Commission's remedial order. *See Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 66 S.Ct. 758, 90 L.Ed. 888 (1946); *FTC* v. *Royal Milling Co.*, 288 U.S. 212, 53 S.Ct. 335, 77 L.Ed. 706 (1933). More specifically the claim is, as it has been all along,[4] that the order appealed from covers not only "uniqueness" claims of the type which has been found false by the administrative law judge, but also covers advertising claims with respect to "performance characteristics" of the product, *i. e.* air cooling, dehumidification and circulation, which Fedders claims were not involved in the FTC proceeding. Since Fedders quite properly agrees that the Commission has the power within its discretion to enjoin "like and related acts" to the one condemned, *FTC*, v. *Mandel Bros., Inc.*, 359 U.S. 385, 393, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959), the question before us is whether the Commission's order is sufficiently narrow to come within that standard. We hold that it is and deny the petition for modification of the order.

[2,3] There is much broad language in the cases that the Commission has a wide discretion in its choice of a remedy to "cope with the unlawful practices" disclosed by the record. *Id.* at 392, 79 S.Ct. [818] at 824; *Jacob Siegel Co.* v. *FTC, supra*, 327 U.S. at 611, 66 S.Ct. 758. The Commission

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[3] There were in fact three misrepresentations found by the Commission, none of which are challenged here: (1) that "reserve cooling power" is a unique feature of the Fedders room air conditioners; (2) that Fedders room air conditioners compared with all other conditioners have a significantly increased cooling capacity at high loading conditions under customary use; and (3) that Fedders had a reasonable basis for concluding that compared with all other room air conditioners its product had that increased cooling capacity.

As will be discussed in the text below the Commission also found that

> [i]n claiming that only Fedders' air conditioners possessed RCP, respondent was clearly making a statement about the performance of its product, namely that this performance was unmatched. What rendered these false representations material in the eyes of consumers, and no doubt what led respondent to make them, was the message they conveyed about the relative performance of the product, and not merely the message of "uniqueness" in some disembodied sense.

[4] The Commission in its original complaint set forth an order which it had "reason to believe should issue" if the facts were found as indeed they were. Paragraph 4 of this draft order forbade any performance claims unless substantiated and from its initial answer petitioner has objected to any restriction on "performance" claims. Paragraph 2 of the administrative law judge's order applied to any and all unsubstantiated performance claims but the Commission's final order, set forth in the text at footnote 2, limited this paragraph to performance claims relating to "air cooling, dehumidification, or circulation characteristics."

is not limited to prohibiting "the illegal practice in the precise form" existing in the past. *Federal Trade Comm.* v. *Ruberoid Co.*, 343 U.S. 470, 473, 72 S.Ct. 800, 803, 96 L.Ed. 1081 [1952]. This agency, like others, may fashion its relief to restrain "other like or related unlawful acts." *Labor Board* v. *Express Pub. Co.*, 312 U.S. 426, 436, 61 S.Ct. 693, 700, 85 L.Ed. 930 [1941].

FTC v. *Mandel Bros., Inc., supra*, 359 U.S. at 392, 79 S.Ct. at 824. "One cannot generalize as to the proper scope of these orders. It depends on the facts of each case and a judgment as to the extent to which a particular violator should **[1402]** be fenced in." *Id.* Congress has placed the primary responsibility for fashioning orders upon the Commission, and for this reason the courts should not lightly choose to modify the Commission's orders. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965); *FTC* v. *Cement Institute*, 333 U.S. 683, 726, 68 S.Ct. 793, 92 L.Ed. 1010 (1948). So long as the remedial order is reasonably related to the unlawful practices found to exist, the Commission's order should be upheld. *FTC* v. *National Lead Co.*, 352 U.S. 419, 428, 77 S.Ct. 502, 1 L.Ed.2d 438 (1957); *Hoving Corp.*, v. *FTC*, 290 F.2d 803, 806 (2d Cir. 1961).

[4,5] At the same time we take full cognizance of the petitioner's point that, as we expressed it in *Country Tweeds, Inc.* v. *FTC*, 326 F.2d 144, 149 (2d Cir. 1964), the overall concept of "reasonableness" has required the narrowing of deceptive advertising orders so that they more closely relate to the offending conduct while "still sufficiently prohibiting 'variations on the basic theme.' " *See Vanity Fair Paper Mills, Inc.* v. *FTC*, 311 F.2d 480, 487 (2d Cir. 1962). *See also Spiegel, Inc.* v. *FTC*, 411 F.2d 481 (7th Cir. 1969). Mr. Justice Jackson's admonitions in his *Ruberoid* dissent, 343 U.S. at 480, 72 S.Ct. 800 *et seq.*, have not gone unheeded in the courts. And we are fully aware of the suggestion in *FTC* v. *Henry Broch & Co.*, 368 U.S. 360, 367-68, 82 S.Ct. 431, 7 L.Ed.2d 353 (1962), reiterated in *FTC* v. *Colgate-Palmolive Co., supra*, 380 U.S. at 392, 85 S.Ct. 1035, that the stiff penalty procedures under § 45*(1), see Brown & Williamson Tobacco Corp.* v. *FTC*, 527 F.2d 1115 (2d Cir. 1975), may well require a more specific and precise order than would have been necessary prior to the enactment of those penalties in 1959.[5] We note, however, that no problem of lack of specificity or precision in the order is involved here. Fedders' argument is that a false "performance" claim is not simply a "variation upon the basic theme" of a false "uniqueness" claim. A performance misrepresentation, the argument runs, is an offense so distinct from and so much greater than a false claim of uniqueness as not to be "like or related."

[6,7] There is no dispute that paragraph 1 of the Commission's order

[5] *See United States* v. *J. B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974), for the statutory scheme regarding penalties. Professor Jaffe attributes the *Vanity Fair* and *Country Tweeds* modifications of FTC orders to the suggestion in *FTC* v. *Henry Broch & Co.*, 368 U.S. 360, 82 S.Ct. 431, 7 L.Ed.2d 353 (1962). *See* L. Jaffe, Judicial Control of Administrative Action 316-18 (1965).

is reasonably related to the unlawful misrepresentations Fedders has engaged in. Ordering Fedders to cease and desist from making claims that its air conditioners are "unique in any material respect, unless such is the fact," is obviously directly responsive to the Commission's finding that Fedders' claim that its products possessed a "reserve cooling power" was a spurious claim of unique product quality. Petitioner properly concedes that the Commission has authority "to frame its order broadly enough to prevent [the petitioner] from engaging in similarly illegal practices in future advertisements." *FTC* v. *Colgate-Palmolive Co., supra,* 380 U.S. at 395, 85 S.Ct. at 1048. Clearly, paragraph 1 of the order in this case was made well within that authority.

Paragraph 2 of the FTC order, we think, stands on no different footing. This part of the order, which forbids petitioner from making advertising claims as to the "air cooling, dehumidification, or circulation characteristics, capacity or capabilities of any air conditioner" unless substantiated is also reasonably related to the prior misrepresentations which Fedders employed in its sales program. The false claim made by Fedders that its air conditioners possessed "reserve cooling power" implied that some feature of the cooling, dehumidifying or circulation systems of the equipment allowed them to perform better than other air conditioners would at extreme temperature and humidity conditions. That is to say, **[1403]** the vague design claim relating to a reserve cooling power implicated the basic performance characteristics of the entire product. The administrative law judge put it somewhat confusedly when he said that "Respondent has admitted disseminating a false performance claim for its room air conditioners relating to the uniqueness of the ability of its room air conditioners to function satisfactorily at conditions of extreme heat and humidity." The respondent, petitioner here, made no such admission but rather admitted only false claims of uniqueness, the only deceptions charged in the complaint. But as the Commission held, note 3 *supra,* the claim of uniqueness in having "reserve cooling power" was also a performance claim by implication. "Uniqueness," as the Commission footnoted, "is obviously both an attribute in itself and one facet of broader categories of product characteristics, such as price, performance and warranty terms."

[8,9] As to this finding, that the uniqueness claim as to reserve cooling power implies to consumers a claim of high cooling performance in extreme conditions of heat and humidity, we are in the very realm of the Commission's greatest expertise—what constitutes deception in advertising. *See United States* v. *J. B. Williams Co.,* 498 F.2d 414, 445 (2d Cir. 1974) (dissenting opinion). As such the reviewing court must give the Commission's findings "great weight." *See FTC* v.

Colgate-Palmolive Co., supra, 380 U.S. at 385, 85 S.Ct. 1035. On the basis of this finding of implicit misrepresentation the remedial order appears sound as reasonably related thereto. *National Dynamics Corp.* v. *FTC,* 492 F.2d 1333, 1336 (2d Cir.) (per curiam), *cert. denied,* 419 U.S. 993, 95 S.Ct. 303, 42 L.Ed.2d 265 (1974). By limiting the order to unsubstantiated representations as to "cooling, dehumidification, or circulation characteristics, capacity or capabilities," as opposed to the administrative law judge's proscription as to "any" performance characteristic, which would include energy usage, durability or quietness, for example, the Commission has done the necessary limitation which reasonableness would require. More than this a reviewing court may not direct.

[10,11] Fedders makes two additional arguments bearing upon the scope of the Commission's order, but these are subject to speedy disposition. Petitioner argues that since the unlawful acts complained of had been discontinued prior to the filing of the Commission's complaint, its cessation of the offending activity, combined with its written assurance that it will not again resume it, weighs in favor of limiting the order. *See Country Tweeds, supra,* 326 F.2d at 149. The fact that Fedders may have discontinued the offending practice before the Commission issued the complaint in this case, however, does not bar a cease-and-desist order, where the public interest otherwise requires it. *Diener's, Inc.* v. *FTC,* 161 U.S.App.D.C. 213, 494 F.2d 1132, 1133 (1974)(per curiam); *Cotherman* v. *FTC,* 417 F.2d 587, 595 (5th Cir. 1969); *Libby-Owens-Ford Glass Co.* v. *FTC,* 352 F.2d 415, 418 (6th Cir. 1965). Furthermore, the term "reserve cooling power" had been used in Fedders advertising for six or seven years—the claims were described in a bulletin to its distributors as "[o]ld powerful selling friends." These were not, then, merely casual advertising claims. Their discontinuance, the administrative law judge found, was *not* a "voluntary action" but came about as a result of Fedders' "awareness of the Commission's investigation of its advertising." The propriety of the order, under the case law, cannot be challenged. *Coro, Inc.* v. *FTC,* 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied,* 380 U.S. 954, 85 S.Ct. 1088, 13 L.Ed.2d 971 (1965); *Galter* v. *FTC,* 186 F.2d 810, 812–13 (7th Cir.), *cert. denied,* 342 U.S. 818, 72 S.Ct. 34, 96 L.Ed. 619 (1951).

[12] Fedders also claims that the Commission's order is overly broad because it is not, by its terms, limited to objective representations of uniqueness or performance characteristics but also **[1404]** prohibits subjective product claims which are, by definition, incapable of being proven by "scientific or engineering" data. But we do not read the order to have intended the restriction suggested by petitioner. It is only the claim which fairly, if not necessarily, implies some underlying objective basis that the order reaches. We would not hamstring the

Commission by reading its order to apply only to "objective" claims, since it is the impliedly as well as actually objective assertions which effect the deception the Commission is attempting to forestall. On the other hand, we need not and do not consider, in the light of the proceeding below, *see Swift & Co.* v. *United States*, 393 F.2d 247, 256 (7th Cir. 1968), that the order was aimed at the *purely* subjective arguments which merchants sometimes indulge in while hawking their wares.[6] The Commission order may not be construed to have intended to restrict petitioner by requiring objective data to support purely subjective claims, absent an aura of underlying objective support suggested by the advertisement when viewed as a whole. If there is any uncertainty in the application of this order to the petitioner, the uncertainty may be resolved under the Commission's Rules of Practice which permit petitioner to ascertain in advance whether a particular advertising claim comes within the scope of the order, 16 C.F.R. 3.61(d), (e). *FTC* v. *Colgate-Palmolive Co., supra*, 380 U.S. at 394, 85 S.Ct. 1035; *Vanity Fair Paper Mills, Inc.* v. *FTC, supra*, 311 F.2d at 488.

Petition dismissed.

[6] The Commission, in its brief, has admitted that "to the extent that Fedders makes claims that are solely subjective for their product, there is no need for substantiation."

FEDERAL TRADE COMMISSION v. BRITISH OXYGEN COMPANY, LTD., et al.*

No. 74-1492. F. T. C. Docket No. 8955.

(United States Court of Appeals, Third Circuit, January 21, 1976)

1. LACKING FINDING CONNECTING CORPORATION WITH VIOLATIONS OF ANTITRUST LAWS, INJUNCTION PROHIBITING DISPOSAL OF ITS ASSETS WITHOUT PRIOR F.T.C. APPROVAL PENDING RESULTS OF F.T.C. ANTITRUST COMPLAINT WAS UNJUSTIFIED.

Injunction prohibiting corporation from disposing of any of its assets without prior approval of Federal Trade Commission, pending outcome of Commission's antitrust complaint was unjustified in absence of findings of fact con[197]necting that corporation with any violation of antitrust laws, demonstrating need for all of that corporation's assets to be preserved to guarantee that Commission would be able to achieve whatever relief it might be shown to be entitled to, or providing means for reviewing court to determine what evidence served as basis for injunction.

(Syllabus, with substituted caption, taken from 529 F.2d 196)

On vacating the part of the injunction prohibiting disposal of corporation's assets, Court of Appeals held that in the absence of findings of fact connecting corporation with antitrust laws violation, that portion of the injunction requiring preservation of company assets was unjustified.

Vacated in part and remanded.

Lewis A. Kaplan, Paul, Weiss, Rifkind, Wharton & Garrison, New York City, for appellants.

Shearman & Sterling, New York City, *R. Franklin Balotti, Richards, Layton & Finger,* Wilmington, Del., for Airco, Inc.

Potter, Anderson & Corroon, Wilmington, Del., for British Oxygen Co., Ltd., BOC Financial Corp., BOC Holdings, Ltd., and British Oxygen Investments, Ltd.

Calvin J. Collier, Gerald Harwood, Karl H. Buschmann, William A. Cerillo, Washington, D.C., and *Bruce Thall,* Philadelphia, Pa., for appellee.

Argued May 13, 1975.

Before ADAMS, ROSENN and HUNTER, *Circuit Judges.*

* Reported in 529 F.2d 196 (1976). For case before Commission, see 86 F.T.C. 144.

Reargued *en banc* Nov. 4, 1975.

Before SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

OPINION OF THE COURT

JAMES HUNTER, III, *Circuit Judge:*

In 1973, Congress enacted § 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b).[1] The statute gives the Federal Trade Commission power to seek preliminary injunctions in the district court, pending the outcome of administrative cease and desist proceedings, in certain cases where there is reason to believe that a law, the enforcement of which has been delegated to the Commission, is being violated or is about to be violated. The district court in the present case enjoined appellants Airco, Inc. and British Oxygen Company, Ltd., from engaging in a variety of activities, including disposing of any of Airco's assets (except in the ordinary course of business) without prior approval of the Commission.

We vacate that portion of the injunction from which Airco has appealed, as it applies to Airco, and remand the matter to the district court for further proceedings.[2]

I

On February 26, 1974, the Federal Trade Commission (FTC) simultaneously commenced administrative proceedings and applied for a temporary restraining order and preliminary injunction against British Oxygen Company, Ltd., and three of its subsidiaries (BOC) and against Airco. In substance the administrative complaint and application for injunction charged Airco with violation of § 5 of the Federal Trade Commission [198] Act, 15 U.S.C. § 45,[3] and BOC with violations

[1] 15 U.S.C. § 53(b)

(b) Whenever the Commission has reason to believe—

(1) that any person, partnership or corporation *is violating* or is *about to violate, any provision of law enforced by the Federal Trade Commission*, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond * * *.

[2] Appellant Airco has expressly limited its attack on the injunction to Paragraph B. Before the panel hearing of this case, counsel for appellant BOC informed the court and all counsel by letter that BOC "do[es] not intend to file a brief or otherwise prosecute this appeal."

[3] § 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) provides:

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts of practices in commerce, are declared unlawful.

both of § 5 of the Federal Trade Commission Act and of § 7 of the Clayton Act, 15 U.S.C. § 18.[4] The asserted violations arose from BOC's acquisition, through public tender offer, of 35% of Airco's common stock. In the Commission's view, the acquisition was likely to lessen *actual* competition in the inhalation anesthetic equipment and inhalation therapy equipment markets and likely to lessen *potential* competition in the industrial gas market and in the medical pipeline market. Evidence of the asserted violations appeared in the July 25, 1975 agreement between BOC and Airco. The parties agreed to exchange any confidential information, including technical data and know-how, necessary to evaluate the desirability of the proposed tender offer. As a result of this exchange of business data, Airco in a December 10, 1973 memorandum consented to BOC's proposed tender offer and to BOC's representation on the Airco board.

The Commission's § 5 complaint against Airco was based on Airco's cooperation and facilitation of an allegedly illegal stock acquisition by BOC.

BOC is a large international corporation, the second largest world producer of industrial gas, an 8% holder of the domestic inhalation anesthetic equipment market and a significant European manufacturer and distributor of therapy equipment and medical pipeline systems. In two of these fields, inhalation therapy and inhalation anesthetic equipment, BOC or a subsidiary is an actual competitor of Airco. In the other markets, the Commission characterized BOC as a potential entrant. BOC is allegedly one of the few corporations with sufficient financial resources to enter the United States industrial gas or medical pipeline markets despite significant domestic concentration and high entry barriers.

Appellant Airco is a highly diversified corporation. It is the second largest domestic industrial gas producer with a 17% market share, and therefore, a potential competitor of any BOC venture in the United States industrial gas market. Prior to the tender offer, Airco was the largest domestic producer in inhalation anesthetic equipment with a 35% market share and the second largest producer of inhalation therapy equipment with an 11% market share. Since BOC, through subsidiaries, had already entered into these domestic markets, Airco and BOC were direct competitors. Airco, in turn, had a 50% share of the domestic medical pipeline market, making it the leading firm in that market. BOC, with substantial European sales, was a potential entrant in the medical pipeline market.

Despite the fact that Airco engaged in lines of commerce identical to

[4] § 7 of the Clayton Act, 15 U.S.C. § 18, in relevant part prohibits a corporation engaged in interstate commerce from acquiring "any part of the [stock] or assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

those of BOC, Airco alleges, and the FTC does not disagree, that only a portion of its assets are devoted to these endeavors. Sixty-four percent of Airco's assets are devoted to lines of commerce which are not competitive, either actually or potentially, with those of BOC.[5]

On the basis of a probable anti-trust violation, the district court, after a hearing, issued a preliminary injunction under § 13(b) on March 8, 1974.[6] BOC and Airco were ordered to maintain Airco as **[199]** a separate entity, to refrain from confidential communications, to refrain from influencing Airco's independent judgment, and in all ways to hold separate the two companies.

For purposes of this appeal, our focus is directed solely on the application to Airco of Paragraph B of the injunction,[7] which ordered both BOC and Airco to:

> B. *Preserve and protect all assets of Airco and refrain from disposing of or encumbering such assets* except in the ordinary course of business, and refrain from commingling with any other assets of BOC or its subsidiaries, without prior approval of the Commission. (Emphasis added.)

The Commission, by a later order of the district court, was ordered to approve or disapprove any proposed disposition of assets by Airco within fifteen days.

II

§ 13(b) requires that the Commission show the district court that it has "reason to believe" a violation has occurred or will occur and that, upon "weighing the equities and considering the Commission's likelihood of ultimate success," a preliminary injunction is "in the public interest."

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[5] Airco's other divisions include the following: Cryogenic Division, Alloys Division, Speer Carbon-Graphite Division, Speer Electronics Division, Temescal Division, Vacuum Metals Division and Viking Division (Appellant's Brief at 11).

[6] The district court preliminarily enjoined BOC and its subsidiaries, Airco and all directors, employees, agents, successors of the two companies to:

A. Maintain Airco as a viable separate and independent company and to make no changes in its operations likely to hinder a future divestiture of Airco, including a merger, consolidation or acquisition of any equity interest.

B. Preserve and protect all assets of Airco and refrain from disposing of or encumbering such assets, except in the ordinary course of business, and refrain from commingling them with any other assets of BOC or its subsidiaries, without prior approval of the Commission.

C. Refrain from taking any steps to implement any provision of the agreements between Airco and BOC, dated July 25, 1973, and December 10, 1973, respectively, except for Paragraph 4 of the December 10th agreement.

D. Refrain from making available or communicating to each other any confidential or proprietary information, including customer lists, trade secrets, formulas, know-how or manufacturing processes of each party, except this injunction shall not prohibit Airco and BOC from operating under any license agreements between them which were outstanding prior to July 1, 1973 or prohibit them from engaging in normal sales and purchase activities with each other in a volume not in excess of that which existed prior to July 1, 1973.

E. Retain separate and unencumbered all shares of Airco which BOC may own, acquire or control.

F. Refrain from attempting to influence or interfere with Airco's independent judgment on any matter so as adversely to effect [sic] the competitive position of Airco vis-a-vis BOC or any of its subsidiaries.

G. Refrain from transferring any shares of stock or other securities of Airco from BOC Financial to BOC or any other entity or person unless such transferee shall subject itself to the jurisdiction of this Court.

[7] See footnote 2, *supra*.

The fundamental dispute between the parties concerns the scope of activities which can be enjoined if the required showing is made. The Commission's position has been that in an acquisition case, an injunctive provision like Paragraph B can be justified by a showing that the Commission would otherwise be unable to secure complete relief via a subsequent divestiture order. Airco, on the other hand, argues that § 13(b) can *only* be invoked to prohibit actions which are themselves violative of a statute enforced by the Commission. We find it unnecessary to resolve this dispute, since in our opinion Paragraph B cannot be justified on the record here under either view.

III

We first consider Airco's allegation that the district court's fact findings do not satisfy Rule 52(a), Fed.R.Civ.P., which provides that:

> • • • in granting or refusing interlocutory injunctions, the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action.

The district court's findings were so limited as to be inadequate under Rule 52(a). Only one of the district court's **[200]** four limited factual findings makes *any* reference to Airco. In that finding, the district court states:

> 3. That the Commission has made a "proper showing" of a "likelihood of ultimate success" under § 13(b) of the Federal Trade Commission Act that BOC's acquisition of Airco's stock may be found to be in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, at the conclusion of its administrative proceedings now pending before it. (Appendix at 195–196.)

We deem the lone finding insufficient to support the broad injunction issued against appellant Airco under either theory of the scope of § 13(b). Finding of fact number three does not connect Airco with any violation of the antitrust laws, nor does it demonstrate a need for *all* of Airco's assets to be preserved to guarantee that the Commission would be able to achieve whatever relief it may be shown to be entitled to. Secondly, there is no means for the reviewing court to determine what evidence served as the basis for the injunction. For this reason alone, a remand would be appropriate. *O'Neill* v. *United States*, 411 F.2d 139 (3d Cir. 1969); *Fehringer* v. *Bluebeard's Castle*, 395 F.2d 851 (3d Cir. 1968).[8]

IV

But our concern with the proceedings in the district court goes

[8] Airco further alleges that the district court's fact findings are verbatim copies of those prepared by the Federal Trade Commission. In view of our determination that the findings are, at any rate, inadequate under 52(a), we find it unnecessary to discuss this contention.

beyond the failure to present adequate findings of fact. While it is not the proper role of this court to make findings of fact in the first instance, we have reviewed the record.

Our examination raises serious doubts as to whether there was sufficient evidence from which findings justifying the relief granted *could* have been made. Since these doubts persist even under the more expansive reading of § 13(b) urged by the Commission, we once again emphasize that we do not decide the statutory interpretation question.

V

For the foregoing reasons, Paragraph B of the injunction against appellant Airco will be vacated and the case will be remanded to the district court for further proceedings consistent with this opinion.

ROSENN, *Circuit Judge* (concurring).

In enacting section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), Congress empowered the Trade Commission to seek a preliminary injunction pending the outcome of administrative cease and desist proceedings "whenever the Commission has reason to believe" that a law enforced by the Commission is about to be violated or is being violated, and upon a showing that injunctive relief is in the public interest. Unfortunately, the district court's findings do not satisfy Rule 52(a), Fed.R.Civ.P., and do not establish that Airco has committed a violation of section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1). We may look to a court's opinion to supplement its findings, *see Hooper's Estate* v. *Gov't of the Virgin Islands*, 427 F.2d 45, 48 (3d Cir. 1970), but the opinion written when the district court denied Airco's motion to modify the disputed restraint offers little aid in this respect. I therefore concur with the holding of the majority that we must vacate and remand.

I am constrained to disagree with part IV of the majority opinion, however, because I do not share their reservations as to whether there is sufficient evidence on this record from which findings justifying the relief granted could have been made. In any event, I would defer an analysis of the sufficiency of the evidence supporting the grant of the preliminary injunction until the district [201] court has made the required findings on remand.

Chief Judge SEITZ joins in this concurring opinion.

EXXON CORPORATION et al. v. FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 75–167. F.T.C. Docket No. 8934.

(United States District Court, District of Delaware, January 30, 1976)

1. GROUND FOR ASSERTION OF JURISDICTION IS NOT PROVIDED BY A.P.A.

[1363] Administrative Procedure Act is not a ground for assertion of jurisdiction.

2. DECLARATORY JUDGMENT STATUTE PROVIDES FORM OF PROCEDURE AND REMEDY, BUT IS NOT A SEPARATE GRANT OF JURISDICTION TO FEDERAL COURT.

Declaratory judgment statute is not separate grant of jurisdiction to federal court but only provides a form of procedure and remedy.

3. FACTUAL ALLEGATIONS OF COMPLAINT HAD TO BE TAKEN AS TRUE WHERE MOTION TO DISMISS FOR LACK OF JURISDICTION WAS BASED SOLELY ON PLEADINGS.

Where motion to dismiss for lack of jurisdiction was based solely on pleadings, factual allegations of complaint had to be taken as true though not the conclusions of law.

4. STATUTE GRANTING JURISDICTION IN ANY CASES ARISING FROM CONGRESSIONAL ACT PROTECTING TRADE OR COMMERCE AGAINST RESTRAINTS AND MONOPOLIES IMPARTS JURISDICTION OVER ACTION CHALLENGING F.T.C. POWER TO ISSUE ORDER.

Jurisdiction over action challenging Federal Trade Commission's power to issue certain order existed under statute granting jurisdiction in cases arising under any act of Congress protecting trade or commerce against restraints and monopolies.

5. STATUTE GRANTS JURISDICTION IN CASES ARISING UNDER CONSTITUTION IF MATTER IN CONTROVERSY EXCEEDS $10,000; WHERE COMPLAINT ALLEGED AMOUNT IN CONTROVERSY EXCEEDS $10,000 AND IS UNCONTROVERTED, SUBJECT MATTER JURISDICTION EXISTS.

Subject matter jurisdiction existed over action challenging constitutionality of Federal Trade Commission order under statute granting jurisdiction in cases arising under Constitution if matter in controversy exceeds $10,000 in value, where allegations in complaint that amount in controversy exceeded $10,000 was uncontroverted.

6. WHERE PARTIES WERE REPRESENTED AND GIVEN OPPORTUNITY TO ASSERT THEIR POSITIONS, HEARING HELD AFTER ISSUANCE OF ORDER BUT PRIOR TO ORDER BECOMING EFFECTIVE WAS RENDERED HARMLESS THE ALLEGED VIOLATION OF DUE PROCESS IN ISSUING DOCUMENT PRESERVATION ORDER EX PARTE.

Alleged violation of due process in issuing document preservation order ex parte was harmless, where parties were represented and given opportunity to assert their

* Reported in 411 F.Supp. 1362 (1976).

positions at hearing which was held several days after original issuance of order but before order became effective.

7. FAILURE OF A.L.J. TO INCLUDE OTHER GOVERNMENT AGENCIES IN PRESERVATION ORDER COULD NOT BE DEEMED VIOLATION OF PLAINTIFFS' RIGHT TO DUE PROCESS ABSENT SHOWING THAT SOUGHT DOCUMENTS HAD BEEN DESTROYED OR UNAVAILABLE.

Absent a showing that documents sought by oil companies had been destroyed or were unavailable in the public record or through alternative methods of discovery, administrative law judge's failure to include government agencies other than the Federal Trade Commission in order requiring preservation of documents by oil companies named as respondents in complaint filed with Commission could not be deemed a violation of companies' due process rights.

8. WHERE QUESTION OF WHETHER OR NOT AN AGENCY HAS EXCEEDED ITS POWER CANNOT BE EASILY ASCERTAINED, COURT MUST DETERMINE WHETHER ADEQUATE REVIEW IS AVAILABLE FOLLOWING FINAL AGENCY ORDER, AND ENTERTAIN ACTION IF SUCH REVIEW IS NOT POSSIBLE.

Where it is clear that administrative agency has not exceeded its statutory power, court will rule that no jurisdiction exists as to action challenging agency's conduct; where it is clear on law alone that agency has exceeded its power, court will entertain the action; where it is not clear, i.e., where consideration must necessarily involve close determination requiring examination of record below, court must determine whether adequate review is available at a time following a final agency order and entertain action if such review is not possible.

9. WHETHER ADDITIONAL AGENCY ACTION IS REQUIRED BEFORE ORDER WILL HAVE DIRECT EFFECT ON PARTY SEEKING REVIEW; WHETHER QUESTION IS MERELY ONE OF LAW; AND WHETHER THERE IS A STATUTORY BAR TO ACCESS TO COURT ARE, FOR PURPOSE OF JUDICIAL REVIEW, INDICIA OF "FINALITY" OF AN ADMINISTRATIVE ORDER.

Indicia of "finality" of an administrative order for purposes of judicial review include whether further agency action is planned, whether further agency action is necessary before order will have direct effect on party seeking review, whether question presented is merely one of law and whether there is a statutory bar to access to court.

10. EVEN THOUGH PLAINTIFFS HAD RIGHT TO SEEK ADMENDMENTS EXCLUDING SPECIFIC CATEGORIES OF DOCUMENTS, ORDER REQUIRING PRESERVATION OF EXISTING DOCUMENTS WAS FINAL AGENCY ACTION.

Order which required oil companies named as respondents in complaint filed with Federal Trade Commission to preserve existing documents relating to their business and which was already in effect at substantial cost and burden to companies was final for purposes of ripe[1364]ness and judicial review even though companies had right to seek amendments excluding specific categories of documents from breadth of order.

11. WHERE ACTION WAS OTHERWISE FIT FOR JUDICIAL REVIEW, COURT WOULD NOT REFUSE TO ENTERTAIN ACTION ON GROUND OF UNRIPENESS BECAUSE IT INVOLVED QUESTIONS OF BOTH FACT AND LAW.

Court would not refuse to entertain action challenging validity of Federal Trade Commission order on ground of unripeness because it involved both questions of facts and law, where action was otherwise fit for judicial review.

12. COURT IS NOT PRECLUDED FROM ENTERTAINING CHALLENGE TO

VALIDITY OF INTERLOCUTORY ORDER SINCE RAISING THE QUESTION OF VALIDITY OF F.T.C. ORDER AT TIME F.T.C. MOVES TO SUBPOENA IS NOT ADEQUATE SUBSEQUENT REVIEW OF ORDER.

That question of validity of Federal Trade Commission order requiring preservation of existing documents may be raised at time Commission moves to subpoena documents is not an adequate subsequent review of order so as to preclude court from entertaining action challenging validity of interlocutory order.

13. COURT IS NOT BARRED FROM ENTERTAINING CHALLENGE TO VALIDITY OF INTERLOCUTORY ORDER SINCE REVIEW OF F.T.C. ORDER ON MERITS OF COMPLAINT IS NOT ADEQUATE SUBSEQUENT REVIEW.

A review of Federal Trade Commission order requiring respondents in complaint filed with Commission to preserve certain documents following a final order by Commission on merits of complaint is not an adequate subsequent review of order so as to preclude court from entertaining action challenging validity of interlocutory order.

14. ADEQUATE SUBSEQUENT REVIEW OF ORDER IS NOT PROVIDED IN CONTEMPT PROCEEDINGS ARISING OUT OF DESTRUCTION OF DOCUMENTS ORDERED PRESERVED.

A contempt proceeding arising out of destruction of documents ordered preserved by Federal Trade Commission order is not an adequate subsequent review of order so as to preclude court from entertaining action challenging validity of interlocutory order.

15. ISSUE IS RIPE FOR REVIEW IF QUESTION ON REVIEW CANNOT CLEARLY BE PRESERVED FOR LATER REVIEW AND SUBSEQUENT REVIEW OF ISSUE IS INADEQUATE.

Where it is not clear that question presented on review of Federal Trade Commission order could be preserved for later review, later review could follow different standard and only alternative method of preserving and raising issue carries a not insignificant risk of penalties other than mere fines, subsequent review of issue is not adequate and, absent damage to the public interest, issue is ripe.

16. WHERE PUBLIC INTEREST AND ADMINISTRATION OF F.T.C. BUSINESS WOULD NOT BE ADVERSELY AFFECTED, AND WHERE ADEQUATE REVIEW WAS UNAVAILABLE AT LATER TIME, COURT HAD JURISDICTION TO ENTERTAIN ACTION.

Court had jurisdiction to entertain action challenging validity of interlocutory order which was issued by Federal Trade Commission and required preservation of documents where there was no adequate review of validity issue available at later time and public interest and administration of Commission's business would not be adversely affected by court's consideration of issue.

17. ONLY WHERE INJUNCTIVE RELIEF IS SOUGHT DOES ISSUE OF IRREPARABLE HARM ARISE.

Issue of irreparable injury arises only where relief sought is injunctive.

18. IN REVIEWING CLAIM THAT ORDER WAS INVALID, STANDARD TO BE USED IS WHETHER AGENCY'S ACTION WAS ARBITRARY OR CAPRICIOUS, NOT IN ACCORDANCE WITH LAW; CONTRARY TO CONSTITUTIONAL GUARANTEES; IN EXCESS OF ITS POWER; WITHOUT DUE PROCESS; OR UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

Standard to be used in reviewing claim that Federal Trade Commission order requiring preservation of certain documents was invalid as being beyond Commission's power and being in violation of constitutional rights was whether agency's action was arbitrary and capricious, not in accordance with law, contrary to constitutional guarantees, in excess of its power, without due process or unsupported by substantial evidence.

19. LIMITATIONS CONGRESS HAS PLACED ON EXERCISE OF SPECIFICALLY GRANTED F.T.C. POWERS MUST GUIDE COURT IN MAKING DETERMINATION OF EXISTENCE AND SCOPE OF SUCH POWER.

In determining existence and scope of power of Federal Trade Commission to enter order requiring preservation of documents, court is to be guided by limitations Congress placed on exercise of specifically granted FTC powers.

20. TO UPHOLD ORDER WHICH WAS ISSUED UNDER NEWLY CLAIMED POWER AND NOT BASED ON SPECIFIC GRANT OR AUTHORIZATION, COURT HAD TO BE SATISFIED THAT USE OF POWER WAS CONSISTENT WITH F.T.C. ACT.

Where order issued by the Federal Trade Commission requiring preservation of certain documents was under a newly claimed power and not based on specific grant or authorization, court to uphold order had to be satisfied that use of power was not inconsistent with the Federal Trade Commission Act.

21. THE A.P.A. PROSCRIBED ATTEMPT TO SHIFT BURDEN OF PROOF TO RESPONDENTS.

[1365] Attempt to shift burden of proof to oil companies named as respondents in complaint filed with Federal Trade Commission to show that documents covered by Commission order requiring preservation of existing documents was proscribed by the Administrative Procedure Act.

22. RULES OF EVIDENCE ARE NOT CONTROLLING AS TO ADMISSIBILITY, SINCE AGENCIES ARE NOT RESTRICTED TO RIGID REQUIREMENTS OF THOSE RULES.

Agencies are not restricted to rigid requirements of rules of evidence and those rules are not controlling as to admissibility.

23. WHERE A.L.J. DID NOT MAKE FINDINGS ON RECORD INDICATING WHAT WAS BEING ORDERED IN LIGHT OF WHAT THE FACTS SUPPORTED, COURT COULD NOT REVIEW VALIDITY OF ORDER.

Court could not review validity of order which was entered by administrative law judge and affirmed by the Federal Trade Commission and which required oil companies named as respondents in complaint filed with Commission to preserve existing documents, where administrative law judge did not make findings on record indicating what was being ordered in light of what the facts supported.

(Syllabus, with substituted captions, taken from 411 F.Supp. 1362)

On Commission motion to dismiss and oil companies' motion for summary judgment, court held that it has subject matter jurisdiction over administrative law judge's interlocutory order requiring document preservation; record established that adequate subsequent review was unavailable; and that where the administrative law judge did not make findings on record indicating what was being ordered in

light of what the facts supported, court could not review validity of the order.

Motion to dismiss denied, motion for summary judgment denied, order vacated and case remanded.

Thomas Herlihy, Jr., of *Herlihy & Herlihy*, Wilmington, Del., for Exxon Corp.; *William Simon, John S. Kingdon, Robert G. Abrams*, and *Robert J. Brookhiser* of *Howrey & Simon*, Washington, D.C., of counsel.

James M. Tunnell, Jr., of *Morris, Nichols, Arsht & Tunnell*, Wilmington, Del., for Texaco, Gulf Oil and Shell Oil; *Robert F. McGinnis, William C. Weitzel, Jr.*, and *Philip W. Schaefer*, New York City; *Milton Handler, Fred A. Freund*, and *Milton J. Schubin* of *Kaye, Scholer, Fierman, Hays & Handler*, New York City of counsel, for Texaco; *Jesse P. Luton, Jr., John E. Bailey*, and *W. Bernard Fudge*, Houston, Texas, of counsel, for Gulf Oil; *Edward F. Howrey, J. Wallace Adair, Keith E. Pugh, Jr.*, and *James R. Fox*, Washington, D.C., of counsel, for Shell Oil.

W. Laird Stabler, Jr., U.S. Atty., and *Kent Walker*, Asst. U.S. Atty., Wilmington, Del., for defendants; *Robert J. Lewis*, Gen. Counsel, *Gerald P. Norton*, Deputy Gen. Counsel, *Gerald Harwood*, Asst. Gen. Counsel and *John T. Fischback*, F.T.C., Washington, D.C., of counsel.

Opinion

Caleb M. Wright, *Senior District Judge:*

This is an effort by certain major oil producing and marketing corporations to appeal an interlocutory order entered by an Administrative Law Judge and affirmed by the Federal Trade Commission. Although the factual background is not complex, certain facets of the case, including the order issued, are novel. An understanding of the background of the case is therefore necessary to an understanding of the ruling of the Court.

I. Factual Background

The plaintiffs in this action are four major oil companies[1] which, with certain others,[2] are respondents in a complaint filed before the Federal Trade Commission ("Commission"). That complaint, FTC Docket No. 8934, is the culmination of an investigation conducted by the Commission staff during the past several years on the "anticompetitive structure" of the market in the production, refining and marketing of crude oil and refined oil products. The complaint alleges that as a result of agreements among the respondents, and actions on

[1] Exxon Corp., Texaco, Inc., Gulf Oil Corp., and Shell Oil Corp.

[2] The other respondents in the FTC complaint are Mobil Oil Corp., Standard Oil Company of California, Standard Oil Co. (Indiana) and Atlantic Richfield Co. *See* FTC Docket No. 8934.

their part, there is a restraint of trade in a market defined in the complaint. The actions complained of by the Complaint Counsel[3] go back as far as 1948. Coun[1366]sel for both sides agree that the proceedings on the complaint are likely to consume five to ten more years before a decision on the substantive merits is made by the Commission. *See* Transcript of Oral Argument at 17.

As a part of the proceedings on the Commission complaint, Complaint Counsel sought and secured the order here at issue from the Administrative Law Judge assigned to the case. The order required the oil companies and Complaint Counsel to refrain from the destruction of virtually all documents in existence at the time the order was issued.[4] The Order was issued *ex parte*, after a written motion by the Complaint Counsel, on the grounds that "document retention programs"[5] carried on by the oil companies were likely to destroy what might be potentially relevant evidence.[6]

Following the issuance of the Order the oil companies objected to its scope and its *ex parte* nature. The Administrative Law Judge held a hearing several days after the issuance of the Order.[7] At the end of the hearing, the Administrative Law Judge announced his decision that the Order would stand as issued, though the oil companies would have leave to seek changes in the Order with regard to specific documents.[8] No further explanation was forthcoming from Complaint Counsel or the Administrative Law Judge as to the nature of the asserted relevance.

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[3] "Complaint Counsel" is the attorney who presents the views of the FTC staff and otherwise conducts the "plaintiff's" or "complainants' " case before the Administrative Law Judge or the FTC in adjudicatory hearings. Complaint Counsel secured the order in question, but did not appear in the Court to defend the order. Instead, the order was supported by the General Counsel's office of the Commission. To avoid the appearance of any conflict of interest, or prejudice to the Commission's adjudicatory functions during the pendency of a complaint before the Commission, Complaint Counsel do not represent the Commission. *See generally*, Transcript of Oral Argument. Dec. 5, 1973, at 13, 14 [hereinafter "Tr. of Oral Arg."]

[4] This order, hereinafter "the Order", is as follows:

> "It is Ordered that all parties to this proceeding * * * shall henceforth preserve and secure from destruction all presently existing documents, writings, recordings, or other records of any kind whatsoever which relate in any way to the exploration, production, transportation, and refining of crude oil and the transportation and marketing of refined petroleum products, including, but not limited to, matters set forth in Complaint Counsel's Prediscovery Statement filed February 22, 1974, and complaint counsel's domestic and international discovery outlines attached as appendices to the Motion of Complaint Counsel For Major Integrated Procedural Relief, dated October 18, 1974* * *."

This Order was limited to allow the oil companies 10 days in which to respond and "show cause" why the Order should be rescinded; and to allow Complaint Counsel to make a showing requiring the preservation of records being generated, rather than those which were in existence at the time the Order was issued.

[5] With the ease of veteran users of Newspeak, *see* G. Orwell, Nineteen Eighty Four (1949), *passim* and Appendix, all counsel in this action have used the term "document retention programs" to refer to programs whose purpose is the destruction of categories of documents when those documents reach a certain age, or are duplicable, or are otherwise within the policy used by the organization. For the sake of an orderly record, though with misgivings about the use of our mother tongue, the Court will also refer to these programs as "document retention programs". It will insist, however, on quotation marks around the work "retention".

[6] *See* "Motion of Complaint Counsel for an Order to Preserve Documents" filed in Docket No. 8934 on November 8, 1974; *and* the Order issued thereon, Docket No. 8934, filed November 12, 1974.

[7] *See*, Transcript of Hearing, filed as Exhibit A to Plaintiffs' Motion for Summary Judgment. Docket No. 11A in this Court, at 306-07, 309.

[8] *See*, Transcript of Hearing, *supra*, note 7 at 366, 373, 374.

The Order was then appealed by the oil companies to the Commission,[9] and **[1367]** certain of the oil companies also sought relief from the breadth of the Order by moving to have some categories of documents declared to be outside the Order.[10] As a result of these motions, the Administrative Law Judge amended his order to specify that some documents were not within the scope of the Order, and that other documents which were duplicated and duplicable could be destroyed.[11]

On appeal, the Commission affirmed the issuance of the Order. The Commission declared that although the power had not heretofore been used, it was nonetheless part of the Commission's powers as granted by Congress; and that although it was error for the Order to have issued

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[9] The Administrative Law Judge certified the question to the Commission, since the Order was viewed as interlocutory, and would otherwise not have been before the Commission until after the Administrative Law Judge had recommended findings on the merits. The questions certified to the Commission were whether the Administrative Law Judge had the power to issue a preservation order (which was characterized as being in the nature of a preliminary injunction); and whether, if such power existed, the Administrative Law Judge could refuse to apply the order to governmental agencies other than Complaint Counsel. The Commission took the appeal on January 13, 1975, but in doing so, provided that the Administrative Law Judge would continue to have the power to modify his original Order. *See*, Docket No. 8934, Order of February 5, 1975, at 2, 3.

[10] Mobil and Atlantic Richfield both filed motions to limit the scope of the Order. Although not all of the respondents were named as parties to the motions, the ruling by the Administrative Law Judge with regard to the relevancy of documents of a category held by one oil company would likely be extended to include those held by other oil companies.

[11] The order with regard to the motion filed by Mobil was the result of consent by the Complaint Counsel to an interpretation of the original order. Under the "interpretation", interim compilations or working papers could be destroyed provided that the means exist to reconstruct those papers from the final product; and microfilm or other exact copies of the materials may be kept in lieu of the originals. *See*, "Order Interpreting Order For Preservation of Records", Docket No. 8934, Nov. 27, 1974.

The motion of Atlantic Richfield insofar as it sought clarification or limitation of the original order was granted in some respects, and denied in others. As a result of the Administrative Law Judge's ruling on that motion: (1) data processing records are exempted except insofar as they inventory records available or are reviewed by management personnel other than data processing management personnel, or cannot be recreated from other available documents; (2) retail credit billing information is exempted except that a microfilm copy of all tickets and original statements, and a copy of the master file must be retained; (3) stock transfer records are exempted except that one copy of all reports to government agencies, all ledgers, and reports to security holders must be retained; (4) construction planning documents are exempted except that one copy of all final documents must be retained; (5) certain banking transaction items are exempted; (6) certain insurance items are exempted; (7) manufacturing maintenance records are exempted, except that all records relating to refining and "through-put" (*cf.* note 5 *supra*) of crude oil must be retained; (8) certain employee information is exempted, except that one copy of all policies must be retained, as well as labor relations documents; (9) research reports of various kinds are exempted, except that all final reports to management personnel must be retained; (10) duplicates, except duplicates with extraneous notations are exempted provided a master copy is retained; (11) microfilm copies may be retained in place of originals provided that no copy containing "extraneous notations" may be destroyed; (12) safety and security documentation is exempted; (13) temperature and other data readings on various processes are exempted; (14) outside publications not generated by the Company and publicly available are exempted; (15) routinely discarded material such as steno pads, scratch paper and used carbon paper are exempted; (16) patent data is exempted except for records relating to licensing of patents; (17) telephone records are exempted except for one copy of all telephonic directories; (18) retail credit information files, such as bad debt records, are exempted.

In spite of the foregoing limitations, however, no party may destroy anything which would not have been destroyed under the document "retention" program in effect at the time of the original Order; and all recreation of data destroyed shall be at the expense of the party who destroyed the data. *See*, Docket No. 8934, "Order Modifying Preservation. * * *" Feb. 5, 1975.

A reading of the subsequent modifications of the Order indicates not only its original scope, but also the present scope and the failure anywhere in the existing order as modified to provide for a showing of relevancy to the proceedings.

originally in an ex parte fashion, the error was harmless since it was remedied by a hearing held within a few days from the issuance.[12] The Commission also found that the oil companies were not entitled to an amendment of the Order to include certain other government agencies.[13]

[1368] Thereafter the oil companies filed a complaint in this Court, alleging that the Order as then constituted was an unlawful act on the part of the Commission and beyond the scope of its powers; that the Order violated the rights of the oil companies under the Fourth, Fifth, and Fourteenth Amendments to the Constitution; that it was a final order as to which no other relief or later review would be adequate; and that they were entitled on those grounds to a finding that the Order was unlawful and to an injunction against its continuation, or, if the Commission is found to have such power, a declaration that the Order be expanded to include other government agencies. The Commission in response filed a motion to dismiss the Complaint on the gounds that the Order was not a final order; that there were other avenues of review which were adequate to prevent harm to the oil companies; and that the complaint otherwise failed to state a claim upon which relief could be granted. The oil companies opposed the Commission's motion to dismiss and filed a motion for summary judgment on their claim. The issues on both matters were briefed, and oral argument was heard by the Court on December 5, 1975.

For the reasons discussed *infra*, the Court is of the opinion that the Order must be vacated and remanded to the Commission for further findings. The Court cannot, without a clearer record than is present here, make a determination on the power of the FTC to issue such an order, whether or not it includes other government agencies.

II. Jurisdiction

The Commission has challenged the jurisdiction of the Court to hear this case, urging that neither the Administrative Procedure Act[14] nor the Declaratory Judgment Act[15] provides for review of orders such as the present one because the plaintiffs have failed to exhaust their administrative remedies; and the order is not a final one in any event.

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[12] *See*, Docket No. 8934. "Order Affirming Denial of Motions to Rescind Order for Preservation of Documents", March 25, 1975, at 2, 3.

[13] *Id.* at 3.

The oil companies contended before the Administrative Law Judge, the Commission and here, that if the Commission had the power to issue the Order, it should also require all the agencies of the United States government, rather than only Complaint Counsel, to preserve documents. The oil companies urge that the preservation of such documents as are in the hands of the agencies is required because their defense to the FTC complaint includes, *inter alia*, that any anticompetitive structure of the market which exists was a result of government policies in the post-World War II era. *See*, *infra*, note 27.

[14] Act of June 11, 1946, 60 Stat. 243, as amended, 5 U.S.C. §§ 551–706; cited hereinafter as APA and by section number only.

[15] Act of June 25, 1948, 62 Stat. 964, as amended, 28 U.S.C. §§ 2201, 2202.

The oil companies assert that jurisdiction does exist, and that review under the APA and the Declaratory Judgment Act is possible.

[1–3] It is clear in this Circuit that the APA is not a ground for the assertion of jurisdiction.[16] However, plaintiffs assert several other grounds of jurisdiction, including 28 U.S.C. §§ 1331(a), 1337, and 1361.[17] In the posture of the **[1369]** present motions, the Court is satisfied that jurisdiction to consider the case exists.

A. § 1337

[4] The Third Circuit has held that § 1337 provides a jurisdictional base under conditions similar to those here. In *Bachowski* v. *Brennan*, *supra*, note 16, 502 F.2d at 82-83, *aff'd.*, 421 U.S. 560, 566, 95 S.Ct. 1851, 44 L.Ed.2d 377, the Court held that an action based on provisions of the Labor-Management Reporting and Disclosure Act,[18] was a suit arising under an act regulating commerce. There is no doubt that the Federal Trade Commission Act was passed to "protect trade and commerce against unlawful restraints and monopolies," see 15 U.S.C. §§ 44, 45, and this Court is satisfied that an action brought to challenge the power of the Commission to issue particular orders is within the scope of that section.[19] See *Bachowski* v. *Brennan*, 502 F.2d at 82–3; *General Motors* v. *Volpe*, 321 F.Supp. 1112, 1121 (D.Del.1970).

B. § 1331

[5] Since the Court has held that subject matter jurisdiction exists under 28 U.S.C. § 1337, it is clear that jurisdiction must also exist

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[16] *West Penn Power Co.* v. *Train*, 522 F.2d 302, 309–10 (3rd Cir. 1975); *Bachowski* v. *Brennan*, 502 F.2d 79, 82 (3rd Cir. 1974), *aff'd. in part and reversed on other grounds, sub nom. Dunlop* v. *Bachowski*, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975).

It is also clear that the Declaratory Judgment statute is not a separate grant of jurisdiction to the federal courts, but only provides a form of procedure and remedy, since by its own terms it applies only "(i)n a case of actual controversy within [the court's] jurisdiction." 28 U.S.C. § 2201. *See, Schilling* v. *Rogers*, 363 U.S. 666, 677, 80 S.Ct. 1288, 4 L.Ed. 2d 1478 (1960); *Skelly Oil Co.* v. *Phillips Petroleum Co.* 339 U.S. 667, 671–72 (1950); *Ragoni* v. *United States*, 424 F.2d 261, 264 (3rd Cir. 1970); *Stamicarbon, N. V.* v. *Chemical Const'n. Corp.*, 355 F.Supp. 228, 232 (D.Del. 1973).

[17] 28 U.S.C. § 1331 provides jurisdiction for cases "aris[ing] under the Constitution, laws, or treaties of the United States," where the matter in controversy exceeds $10,000 in value. Contained in the complaint are allegations of a violation of rights under the Fourth and Fifth Amendments to the Constitution as well as interpretations of federal statutes, and allegations that the matter exceeds the statutory monetary limit. Since the motion to dismiss brought by the Commission is based solely on the pleadings, the factual allegations of the complaint must be taken as true, though not the conclusions of law.

28 U.S.C. § 1337 grants jurisdiction in those cases "arising under any Act of Congress * * * protecting trade or commerce against restraints and monopolies." It would appear beyond dispute that the organic act of the Commission, the Federal Trade Commission Act, 38 Stat. 717, 15 U.S.C. §§ 41–58, as amended, is such an act. *See generally, Federal Trade Commission* v. *Bunte Bros. Inc.*, 312 U.S. 349, 61 S.Ct. 580, 85 L.Ed. 881 (1941).

28 U.S.C. § 1361 provides jurisdiction over actions in the nature of a mandamus against federal officials. One form of relief sought by the plaintiffs is a rule requiring the Administrative Law Judge and the Commission to amend the Order to include other federal agencies. *See* note 13, *supra*.

[18] 73 Stat. 532, 29 U.S.C. § 482(b).

[19] The fact that the action is itself not brought to affect trade and commerce is of no moment. Section 1337 requires only that the action be one "arising under" such an act, and an action challenging the existence of a power asserted under such an act "arises under" the act. *See, Adams* v. *International Brotherhood of Boilermakers, etc.*, 262 F.2d 835 (10th Cir. 1959). "To give rise to Federal Jurisdiction under § 1337, *supra*, the basis of the action must concern the validity, construction or enforcement of a statute regulating commerce." 262 F.2d at 839 (footnote omitted).

under § 1331, if the amount in controversy exceeds $10,000. The tests under both statutes, except for the amount, are the same. *See Peyton* v. *Railway Express Agency, Inc.*, 316 U.S. 350, 62 S.Ct. 1171, 86 L.Ed. 1525 (1942); *Yancoskie* v. *Delaware River Port Auth.*, 528 F.2d 722, 725 (3rd Cir. 1975); *Bachowski, supra*, 502 F.2d at 82, note 3; and 1 Moore's Fed'l. Prac. ¶ 0.60[8.-3] at 627. The allegation contained in the complaint that the amount in controversy exceeds $10,000 is not controverted, and therefore subject matter jurisdiction under § 1331 exists.

C. § 1361

In view of the fact that subject matter jurisdiction has been found to exist under 28 U.S.C. §§ 1331 and 1337, the question of availability of relief under § 1361 need not be decided. The Court notes that mandamus relief under § 1361 would be narrower than the relief available under §§ 1331 and 1337 combined with the APA because review of abuse of discretion might not be available. *See, Bachowski, supra*, 502 F.2d at 83, note 4.[20]

III. Ripeness and Judicial Review

Many of the points the Commission has raised as jurisdictional questions go not to whether there is subject matter jurisdiction in the federal courts, but [1370] whether such jurisdiction ought to be exercised in the present instance. Though the motion to dismiss is made on several bases, the question reduces to whether the order here is sufficiently final to be reviewable, or is otherwise within the usual exceptions to the rule that administrative remedies be exhausted prior to the seeking of judicial relief.[21] Plaintiffs urge here that they have exhausted all administrative remedies reasonably available to them, and that in any event, the suit here is within the exceptions to the exhaustion rule.

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[20] Since the Court holds *infra* that jurisdiction may be exercised in this instance in accordance with the standards set forth in the APA, 5 U.S.C. § 706, there is no need to decide whether the narrower mandamus review might serve. This is particularly so in this case, where it is doubtful that many of the issues raised by the plaintiff could be found to be so free of administrative discretion as to allow the issuance of a mandamus against the Commission and its staff. See, *Bachowski, supra*, 502 F.2d at 83, note 4. *But see, Naporano Metal & Iron Co.* v. *Secretary of Labor*, 529 F.2d 537, 542 (3rd Cir. 1976).

[21] See *Abbott Laboratories, Inc.* v. *Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). The rule has been traced to *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938); and *see, Barnes* v. *Chatterton*, 515 F.2d 916, 920 (3rd Cir. 1975).

A. Exceptions to the Requirements for Exhaustion

The Courts have identified three separate categories of exceptions to the rule requiring the exhaustion of administrative remedies.[22] Those categories are: (1) where there would be no adequate review of the agency action at a later time;[23] (2) where there is a substantial showing by the plaintiff that his constitutional rights have been infringed by agency action;[24] and (3) where there is a substantial showing that the agency has acted outside of its statutory mandate.[25] The oil companies here have attempted to raise all of these grounds to excuse any failure to exhaust administrative remedies.

It should be noted that in each instance, it is not sufficient to raise a merely colorable claim, though in the context of a motion to dismiss, the Court must give some leeway to the claim of the plaintiffs. The issue here is thus whether on the facts presented in the complaint, giving the plaintiff the benefit of proof on all the issues raised, the Court could find a violation of constitutional rights, or an action in defiance of express statutory mandate.[26]

[6] On the constitutional question, the Court is satisfied that the claimed violation of due process in issuing the Order *ex parte*, assumed *arguendo* to have been a violation, was harmless, as the Commission stated in its opinion. The effect of the error was vitiated by the hearing held several days after the original issuance of the Order, before it was effective, at which the parties were represented and during which the oil companies were able to raise all the claims made here. See, *Ewing*, v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598, 70 S.Ct. 870, 94 L.Ed. 1088 (1950).

[7] Plaintiffs also urge that their due process rights were violated by the failure of the Administrative Law Judge to include government agencies other than **[1371]** the FTC in the Order.[27] Plaintiffs base this

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[22] See, *Barnes* v. *Chatterton*, *supra*, 515 F.2d at 920; *Borden, Inc.* v. *Federal Trade Comm'n.*, 495 F.2d 785, 787 (7th Cir. 1974); *American General Ins. Co.* v. *Federal Trade Comm'n.*, 496 F.2d 197, 199 (5th Cir. 1974); *United States* v. *Feaster*, 410 F.2d 1354, 1364 (5th Cir.), *cert. denied*, 396 U.S. 962, 90 S.Ct. 427, 24 L.Ed.2d 426 (1969).

[23] *Barnes*, *supra*, 515 F.2d at 920–21; *Borden*, *supra*, 495 F.2d at 787. *For analytical convenience, this issue is treated* infra *under ripeness, since the question also arises under that rubric.*

In the Fifth and Eighth Circuits, the adequacy of review is not treated as a third factor, but is considered under ripeness. In those circuits, the third exception is that developed in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963); that is, where the continuation of agency action would have severe international repercussions. 372 U.S. at 17, 83 S.Ct. 671. *See, American General Ins. Corp.* v. *Federal Trade Comm'n.*, 496 F.2d 197, 199 (5th Cir. 1974); *Seven-Up Co.* v. *Federal Trade Comm'n.*, 478 F.2d 755, 757 (8th Cir. 1973). There has been no contention that such an exception is applicable here.

[24] *Barnes*, *supra*, 515 F.2d at 920. *Fay* v. *Douds*, 172 F.2d 720 (2d Cir. 1949) is the origin of the exception.

[25] *Leedom* v. *Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958).

[26] *See*, 2a Moore's Federal Practice ¶ 12.08 at notes 6, 7 (2d ed. 1975), and cases cited therein.

[27] This claim was made with particular vigor insofar as it is asserted to be an abuse of discretion on the part of the Administrative Law Judge. The oil companies insist that governmental agencies be required to preserve documents which the plaintiffs assert are necessary for their defense. *See*, *supra*, note 13. Assuming arguendo that such a claim may be made with some force as to the exercise of the agency's discretion, such strength adds nothing to the constitutional claim.

(Continued)

claim on an expansive reading of *Wardius* v. *Oregon*[28] which they assert has created a due process right to "equal discovery". If the Order here were such as to actually deprive the oil companies of discovery, the Court might take a different view. But here, as noted *supra*, note 27, there has been no showing that the documents sought by the oil companies have been destroyed or are unavailable in the public record or through alternative methods of discovery. The holding in *Wardius* was not that every order against a defendant must be matched by a countervailing order to the other side. It was rather that discovery was to be "a two way street" so that a defendant could not be required to divulge his own case while "subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed * * *"[29] Thus, assuming that *Wardius* applies in civil proceedings before administrative agencies, a question on which this Court expresses no view,[30] there has been no showing of a violation sufficient to give rise to constitutional objections. For these reasons, the plaintiffs here are not within this exception.

In support of their contention that the Commission has acted outside of its statutory mandate, the oil companies have raised several arguments: that the issuance of a preservation order is not a power granted to the Commission under any of its organic provisions;[31] that the power to grant such an order is not included in the provisions of the APA governing Administrative Law Judges;[32] that the Commission had recognized this lack of power by never issuing such an order until the present time; and that no support can be drawn from provisions governing other agencies, because each agency has only such powers as Congress chooses to grant to it. The Commission agrees that the order is unprecedented, but finds support for the order in the powers granted to it to subpoena documents in 15 U.S.C. § 49, which power is said to be

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Moreover, this Court is not impressed with the strength of the claim as to discretion. If there has been action by governmental agencies which has led to an "anticompetitive structure" in this market, it seems odd indeed to this Court that such decisions and actions have not been preserved in the formal decisions of the agencies, either in rule making or adjudicative forms. This Court takes judicial notice of the availability of the Federal Register and the Code of Federal Regulations, both in present and past versions, as well as the existence of official and unofficial looseleaf reporting services. The actions of Congress, of course, are preserved in the Statutes-at-Large, the Congressional Record, and various Committee reports and hearing records. The motivations of these agencies in taking such action would not appear relevant, since it is the occurrence of the action and its effects which would give rise to the alleged defense. Therefore, absent some showing by the oil companies that relevant government documents are not available in the public domain or through the Freedom of Information Act, 5 U.S.C. § 552, this Court could not find an abuse of discretion by the agency solely on these grounds.

[28] 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973). In *Wardius*, the Court held reciprocal discovery was necessary for "fundamental fairness" where a state required a criminal defendant to notify the prosecution of his reliance on an alibi defense and of the identity of the witnesses who would make out the defense, but refused to turn over the names of its own rebuttal witnesses. 412 U.S. at 475–76, 93 S.Ct. 2208.

[29] *Wardius, supra*, 412 U.S. 475–76, 93 S.Ct. 2213.

[30] *Cf., Genuine Parts Co.* v. *Federal Trade Comm'n.*, 445 F.2d 1382, 1387 (5th Cir. 1971), holding that the requirements of *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) could not be grafted on to administrative proceedings.

[31] See, 15 U.S.C. §§ 45, 46, 49.

[32] See, 5 U.S.C. §§ 554, 556, 557.

potentially ineffective unless the Commission may also order docu[1372]ments preserved prior to subpoenaing them.

[8] It is not easy to determine whether the Commission has acted outside its statutory powers. It has been held that the error necessary to bring about interlocutory review must be egregious and plain, virtually a blatant disregard of express statutory provisions to the contrary.[33] Nonetheless, the cases have noted the peculiar difficulty of resolving the question of whether the agency has exceeded its statutory powers without considering the merits of the claim raised by the plaintiff.[34] Where it is clear that the agency has not exceeded its power, the court will rule that no jurisdiction exists; and where it is clear on the law alone that the agency has exceeded its power, the court will entertain the action. Where it is not clear, i.e., where the consideration must necessarily involve a close determination requiring an examination of the record below, the court must determine whether an adequate review is available at a time following a final agency order. If such a review is not possible, the court will entertain the action.[35]

Since this question is tied to the question of whether an adequate review of this Order is available in later proceedings, or if the Order is for purposes of review, final and without later review, it is considered below with the question of ripeness. It is sufficient to state here that there is enough of a question raised to create jurisdiction if there were no other adequate review process available.

B. Ripeness

To determine if the Order is ripe for review at the present juncture, the Court must determine whether the Order gives rise to a genuine controversy; whether there is sufficient finality to the Order to make its terms and application definite; and whether a review stage exists at a later time which would be adequate to protect the interests raised.[36]

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[33] *American Gen. Ins. Co.* v. *Federal Trade Comm'n.*, *supra*, 496 F.2d at 200; *United States* v. *Feaster*, 410 F.2d 1354, 1366–68 (5th Cir. 1969), *cert. denied*, 396 U.S. 962, 90 S.Ct. 427, 24 L.Ed.2d 426 (1969); *Coca-Cola Co.* v. *Federal Trade Comm'n.*, 475 F.2d 299, 303 (5th Cir. 1973).

[34] *See, Jewel Companies, Inc.* v. *Federal Trade Comm'n.*, 432 F.2d 1155, 1158–59 (7th Cir. 1970); *American Gen. Ins. Co.*, *supra*, 496 F.2d at 200.

[35] *Id.*

[36] See, *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *Toilet Goods Assoc.* v. *Gardner*, 387 U.S. 158, 162, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967); *General Motors Corp.* v. *Volpe*, 321 F.Supp. 1112, 1125 (D.Del.1970), *aff'd.*, 457 F.2d 922 (3rd Cir. 1972).

> "[I]t is fair to say that its [the ripeness doctrine's] basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories*, *supra*, 387 U.S. at 148–49, 87 S.Ct. at 1515.

The "hardship of the parties" aspect of the text has already been interpreted by this Court. "This inquiry focuses more precisely on the question of the 'adequacy' of the * * * action now pending * * *" *General Motors* v. *Volpe*, *supra*, 321 F.Supp. at 1125.

The oil companies assert that the Order is final, having been appealed to the Commission and affirmed by it; that it is as definite as the Administrative Judge and the Commission chose to make it, and if it is indefinite, that is one of its weaknesses; and that no further review proceedings are available to adequately protect their interests. The Commission has responded that the Order is not actually "final" because by its terms it is subject to motions by the oil companies to have some documents excluded from its scope;[37] that, if the Order is thought indefinite, the oil companies have an adequate remedy through **[1373]** motions seeking clarification; and that an adequate review of the Order is available either when the Commission actually moves to subpoena some of the documents preserved; or upon a final order of the Commission on the merits of the case.

[9–11] This Court is satisfied that the Order is final for purposes of ripeness and judicial review. The leading cases point out that "finality" is to be interpreted pragmatically[38] and list several different indicia of "finality". These indicia include whether further agency action is planned;[39] whether further agency action is necessary before the order will have any direct effect on the party seeking review;[40] whether the question presented is merely one of law;[41] and whether there is a statutory bar to access to the court.[42] Under the circumstances here, the oil companies have met these tests. The fact that further amendments to the Order might be sought is not sufficient to raise the pendency of further administrative hearings as that phrase is used in *Abbott Laboratories*, 387 U.S. at 149, 87 S.Ct. 1507. Any further proceedings at the agency would not return to the question of the agency's power to order preservation of documents, but only to the question of which documents must be preserved, and even on those issues the burden of proof will shift. Nor is any further action necessary for the Order to have an effect on the operations of the plaintiffs here. The Order is presently in effect, at a substantial cost to the plaintiffs in terms of storage as well as the disruption of their established practice.[43] The question here is not one of law only, though

[37] The Commission points to the amending and interpreting orders already issued as evidence of this lack of finality. *See*, notes 10 and 11, *supra*.

[38] *See, Abbott Laboratories, supra*, 387 U.S. at 149–51, 87 S.Ct. 1507.

[39] *Id.* at 149, 87 S.Ct. 1507.

[40] *Id.* at 152–53, 87 S.Ct. 1507, *Toilet Goods Assoc.* v. *Gardner*, 387 U.S. at 163, 164–65, 87 S.Ct. 1520.

[41] *Abbott Laboratories, supra*, at 149–51, 87 S.Ct. 1507.

[42] *Id.* at 153, 87 S.Ct. 1507.

[43] Not only must the plaintiffs here pay the ongoing cost of storage of old records, they must acquire or use more storage space than would otherwise be required for the storage of newly created records since they are not allowed to consolidate older records without the assurance that every copy being destroyed is in fact exactly the same as the retained master. This assurance would require that each individual employee determine that a document he wishes to destroy is not within the Order, a costly task in terms of both time and money.

Of course, as the Commission points out, the costs of litigation are not an "irreparable injury". *See, Myers* v. *Bethlehem Shipbuilding Co., supra*, 303 U.S. 41, 51–52, 58 S.Ct. 459 (1938); *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24, 94 S.Ct. 1028, 39 L.Ed.2d 123 (1974); *Borden, Inc.* v. *Federal Trade Comm'n.*, 495 F.2d 785,

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the plaintiffs contend that the ultimate determination will rest on whether the FTC has the power to issue such an order at all. This Court conceives the issue to be broader, since the Court may be faced with a question of whether in exercising this power, the Administrative Law Judge and the Commission exceeded the reasonable use of the power, or otherwise acted arbitrarily and capriciously. However, the fact that the case is therefore a complicated one involving both facts and law is not conclusive of the availability of review under *Abbott Laboratories, supra*. The Court will not find the issue unripe merely on that basis, if the case is otherwise fit for judicial determination.[44]

Finally, there has been no citation by the Commission to any statute which, by its terms, would forbid the review of the Order at this stage. In fact, an examination of the legislative scheme presented by the Federal Trade Commission Act shows that Congress normally balanced every FTC discovery, subpoena or other mandatory power with an appropriate opportunity for judicial review in en[1374]forcement proceedings.[45] Therefore, this Court holds that the order of the Commission is final as that term is used in determining the availability of judicial review.[46]

It does not appear to this Court that later review proceedings would be adequate to protect the interests of the oil companies. Although as noted *supra*, the Commission has claimed that there are later proceedings at which challenges to the Order could be made, this Court is not satisfied that these later proceedings would provide sufficient guarantees that the issues would be settled, in light of the dilemma presently facing the companies. This is particularly so where the determination of the present motion would not impede the enforcement of the law or adversely affect the public interest.[47]

[12] The Commission has urged that the question of the propriety of the preservation of documents can be raised at the time the Commission moves to subpoena the document. It is not clear that a proper objection to a subpoena for a document in existence is that the

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789 (7th Cir. 1974). But the question is whether there is a sufficient effect to create standing and ripeness (i.e., a concreteness to the issue and the party asserting the interest), not whether the injury gives rise to equitable relief. *See, Abbott Laboratories, supra*, 387 U.S. at 153–54, 87 S.Ct. 1507.

[44] *See, General Motors Corp.* v. *Volpe, supra*, 321 F.Supp. at 1125.

[45] *See*, 15 U.S.C. §§ 45(d), (h), (i), 49, 53 and 56; *Federal Trade Comm'n.* v. *British Oxygen Co.*, 529 F.2d 196 (3rd Cir. 1976)(en banc).

[46] "Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here." *Abbott Laboratories* at 387 U.S. 153, 87 S.Ct. 1507.

And *see, Gardner*, v. *Toilet Goods Assoc.*, 387 U.S. at 171–74, 87 S.Ct. 1520 (1967).

[47] *See, General Motors Corp.* v. *Volpe*, 321 F.Supp. at 1128, setting out two standards for the determining of the hardships faced by the plaintiff. First, both compliance and noncompliance must carry serious costs. Second, the judicial review must not impede the administration of the agency or otherwise adversely affect the public interest.

document ought not to be in existence and would not be in existence if it had not been for a prior order.[48] Even assuming that such an objection could be raised, it could only be raised as to those documents which were subpoenaed. Those documents ordered to be preserved but not subpoenaed would be irrelevant in any discovery enforcement proceedings.

[13] A similar defect applies to any review following a final order by the Commission on the merits. If the oil companies are absolved ten years hence from any wrongdoing, the issue of preservation of documents would appear to be moot: the party capable of raising the issue would have no standing to assert an injury on appeal. If, on the other hand, the companies are found guilty by the Commission, the review in the Court of Appeals will necessarily focus on the support in the record for the Commissions' findings. Subpoenaed documents would either have been dealt with in collateral enforcement proceedings, or any objection would be deemed waived by the voluntary turnover of the documents. Moreover, review would still be limited to those documents actually sought by the Commission. Documents preserved but never turned over to the Commission would not be part of the record on review, and the issue of their proper preservation would seem moot.

[14] A third defect arises in the remaining method suggested to challenge the Order in later proceedings. In the event the oil companies failed to obey the Order, and the documents were later subpoenaed, the Commission suggests that the destruction could be used to test the validity of the Order upon contempt proceedings. It is sufficient to note that proceedings which might lead to criminal penalties on the part of individual defendants for the destruction of relevant **[1375]** evidence, or to adverse determinations on questions of fact because of the unavailability of the documents, do not constitute adequate review.[49] It does not benefit the Commission here to urge that parties may seek review by disobeying outstanding orders.

[15] Thus, where it is not clear that the question now presented could be preserved for later review; where the later review may follow a different standard;[50] and where the only alternative method of

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[48] This is not a search and seizure situation where there would be no knowledge of the existence of the evidence if it had not already been seized or were otherwise the "fruit of a poisonous tree." Since the subpoenas would be subject to judicial scrutiny under 15 U.S.C. § 49, there is no analogy here to a warrantless search among the documents.

[49] *See, Abbott Laboratories, supra*, 387 U.S. at 153, 87 S.Ct. 1507; *Gardner* v. *Toilet Goods Assoc., supra*, 387 U.S. at 173, 87 S.Ct. 1520; *General Motors Corp.* v. *Volpe*, 321 F.Supp. at 1128.

15 U.S.C. § 50 provides criminal penalties for the failure to produce such documents in response to a subpoena. The Commission's counsel stated that the Commission would not seek criminal enforcement, but such a decision would seem more properly that of the Attorney General. And *see*, 18 U.S.C. § 1505.

Nor would such potential penalties be limited to employees of the oil companies. As raised by the Commission's counsel at oral argument, advice to a client by a member of the bar of the FTC, to destroy documents in violation of an order might be of "great interest" to the Commission. *See*, Transcript of Oral Argument at 77.

[50] *Borden, Inc.* v. *Federal Trade Comm'n.*, 495 F.2d at 788; *Jewel Companies* v. *Federal Trade Comm'n.*, 432 F.2d at 1155, 1159 (7th Cir. 1970).

preserving and raising the issue carries a not insignificant risk of penalties other than mere fines to the corporations,[51] subsequent review is not adequate; and absent damage to the public interest, the issue would be ripe.

In the instant case, the public interest and the administration of the agency's business will not be adversely affected by a consideration of the issue at this juncture. The agency has had ample opportunity to express its view on the need for the preservation order, in light of the agency's expertise. Moreover, all the parties have agreed that the matter before the Commission will not be quickly resolved: whatever delay might be added by this case is insignificant. This is especially so where Complaint Counsel is free to continue his probe and move the proceedings forward, since he does not represent the Commission before the Court.[52]

[16] In summary, the Court holds that the present issue is ripe;[53] that there is no adequate review available at a later time; and that this is not a final order, the lack of review at a later time is sufficient to make interlocutory review available. Therefore, jurisdiction to entertain the present case exists, and the motion of the Defendant Commission to dismiss is denied.

IV. Motion to Dismiss for Failure to State a Claim

The Commission has contended that plaintiffs' suit must be dismissed as failing to state a claim upon which relief can be granted.[54] Many of the contentions raised in this regard have been dealt with *supra*, and the analysis will not be repeated here, e.g., whether the Order is final; and whether adequate alternative remedies at law exist. Pressed particularly by the Commission, however, is whether the plaintiffs have been "irreparably injured" by the Order, in view of a long series of cases holding that expenses incident to litigation are not such an injury.[55]

[1376] [17] The issue of irreparable injury arises only where the relief sought is injunctive. The plaintiffs here have sought not only injunctive relief, however, but declaratory relief as well. In view of the holding *infra* that further proceedings must be had in the Commission,

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[51] *General Motors Corp.* v. *Volpe*, 321 F.Supp. at 1128–29. In view of the existence of criminal penalties, this Court does not reach the question determined in *General Motors*, viz., whether the civil penalty which could be imposed is not significant in view of the financial position of the parties.

[52] *See*, note 3, *supra*.

[53] There has been no contention that a genuine controversy does not exist between the parties, and this aspect of the ripeness doctrine is therefore not before the Court.

[54] *See*, Fed.R.Civ.Proc., Rule 12(b)(6).

[55] *See*, *Sampson* v. *Murray*, 415 U.S. 61, 88–92, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974); *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24, 94 S.Ct. 1028, 39 L.Ed.2d 123 (1974); *Barnes* v. *Chatterton*, 3 Cir., 515 F.2d 916, 921. *Cf.*, note 43, *supra*.

the Court deems it unnecessary to decide this issue. The case would continue forward on declaratory relief in any event,[56] which the Court deems adequate for present purposes.[57]

V. Review of the Order

Review of the Order requires determination of three separate issues: the standard of review; The power of the FTC to issue such an order; and assuming *arguendo* the authority, the procedural and factual requirements for the issuance of such an order. These issues will be dealt with *seriatim*.

A. Standard of Review

The standards a Court uses in reviewing agency action are not open to question. The Administrative Procedure Act, 5 U.S.C. § 706,[58] as interpreted by the Supreme Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), sets out six separate standards governing the Court's review.[59] The first four of these standards, which govern review of agency action found arbitrary or capricious, or in excess of procedural, constitutional or statutory requirements,[60] apply in all instances and so must be followed here.[61]

Unlike the situation in *A. O. Smith*, however, in the present case the fifth standard also applies, although the sixth does not.[62] That is, the

[56] The complaint includes sufficient allegations of a need to determine the rights and legal relations of the parties; and as stated above, there is an actual controversy, within the jurisdiction of the Court. The terms of the Declaratory Judgment Act, 28 U.S.C. § 2201 have therefore been met.

[57] In the instant case, declaratory relief would appear to be sufficient in that it could be pleaded as res judicata in any action brought to enforce the Order, by contempt proceedings or otherwise. This Court will not assume that the Commission or the oil companies would ignore or disregard clear findings on the issues presented, even if they were not enjoined from pursuing further litigation.

[58] "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to Sections 556 and 557 of this Title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court • • • ." Act of Sept. 6, 1966, 80 Stat. 393, 5 U.S.C. § 706.

[59] *See*, note 58, *supra*.

A review of the Supreme Court's opinion as it applies to the APA is found in *A. O. Smith* v. *Federal Trade Comm'n.*, 403 F.Supp. 1000, (D.Del., 1975).

[60] 5 U.S.C. § 706(2)(A)-(D).

[61] *Overton Park*, *supra*, 401 U.S. at 414, 91 S.Ct. 814; *A. O. Smith*, *supra*, note 59 at 6. There has been no contention here that review is precluded by a statute or that the determination of the legal issues is solely within the agency's discretion. See 5 U.S.C. § 701. It is also apparent that the oil companies have made sufficient allegations that they are adversely affected or aggrieved by agency action. 5 U.S.C. § 702.

[62] *A. O. Smith*, *supra*, note 59 at 1005-1006.

present case is a review of a proceeding required to be held on the record,[63] and as to which a record exists. Since this is both a re[1377]view of an adjudicatory hearing or part thereof, and a record is required, both aspects of the tests under which § 706(2)(E) is made applicable are present.[64]

Section 706(2)(F) applies, however, only in those reviews where the agency fact finding procedures are inadequate, or where new issues are raised.[65] In the instant case, it is clear that the Commission procedures are adequate to find necessary facts: there are provisions for discovery, including depositions; there are appropriate opportunities for both sides to argue, etc. While the results or the use of the available procedures may not be everything that the Court would wish in a given instance, it is not the procedures themselves which are inadequate.[66] Nor have new issues been raised here: the oil companies have raised the same issues before the Court as were raised before the Administrative Law Judge and the Commission, namely, that the Commission lacks the power in the first instance; that the result is a violation of certain constitutional guarantees; and that the order is fundamentally unfair.

[18] The standard of review to be used by the Court is therefore whether the agency action was arbitrary and capricious, or not in accordance with the law; was contrary to constitutional guarantees; was in excess of its power; was without due process; or was unsupported by substantial evidence.[67]

B. FTC Power

The primary assertion of the oil companies is that the Commission and the Administrative Law Judge lacked the power to issue the order. In support of this assertion, the oil companies point out that nowhere in 15 U.S.C. §§ 45, 46 and 49, is the power to issue orders to preserve documents provided; and that no such additional power is specifically granted to an Administrative Law Judge by 5 U.S.C. § 556(c). Citing early cases including *Federal Trade Comm'n.* v. *American Tobacco Co.*, 264 U.S. 298, 44 S.Ct. 336, 68 L.Ed. 696 (1924); as well as *Civil Aero.*

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[63] *See*, 15 U.S.C. § 45(b); 5 U.S.C. § 556.

[64] *See Camp* v. *Pitts*, 411 U.S. 138, 141, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756–57, 92 S.Ct. 1941, 32 L.Ed.2d 453 (1972); *Overton Park*, *supra*, 401 U.S. at 414, 91 S.Ct. 814; *Dry Color Mfrs. Ass'n., Inc.* v. *Department of Labor*, 486 F.2d 98, 104 note 8 (3rd Cir. 1973).

[65] "First, such *de novo* review is authorized when the action is adjudicatory in nature and the agency fact finding procedures are inadequate. And, there may be independent judicial fact finding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action. H.R. Rep. No. 1980, 79th Cong. 2d Sess. Neither situation exists here." *Overton Park*, *supra*, 401 U.S. at 415, 91 S.Ct. at 823.

And *see Camp* v. *Pitts*, *supra*, 411 U.S. at 141–42, 93 S.Ct. 1241; *A. O. Smith*, *supra*, note 58 at 1005.

[66] *See* 16 C.F.R. § 3.1 *et seq.* setting out the Commission regulations on adjudicatory proceedings.

[67] *See United States* v. *Associated Merchandising Corp.*, 261 F.Supp. 553 (S.D.N.Y.1966).

"This is the Commission's first attempt * * * to enforce an order purportedly made under the adjudicative rules. It is not inevitable, as petitioner seems to assume, that the scope of review here is identical with that in the investigative subpoena cases. On the contrary, the scope may well be broader here." 261 F.Supp. at 560.

Board v. *Delta Airlines, Inc.*, 367 U.S. 316, 81 S.Ct. 1611, 6 L.Ed.2d 869 (1961); and *Soriano* v. *United States*, 494 F.2d 681 (9th Cir. 1974), the oil companies urge that administrative agencies have only such powers as are specifically granted to them, and as creatures of Congress they may not look beyond their organic acts, and other statutes made applicable to their operations.

The Commission agrees that there is no specific authorization regarding preservation orders, but points out that its power to subpoena documents would be useless if such documents could not be preserved; and that both the Commission and the Administrative Law Judge [1378] are empowered to make "procedural rulings" necessary to the proper functioning of the hearings. The Commission also asserts that the leading Supreme Court cases on the powers of the FTC, *United States* v. *Morton Salt Co.*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950); and *FTC* v. *Dean Foods*, 384 U.S. 597, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1966) have made it clear that the FTC is entitled to some leeway in the interpretation of the acts.

Undoubtedly, the Supreme Court has expanded its view of what powers the FTC has from its earlier opinions. *American Tobacco, supra*, 264 U.S. 298, 44 S.Ct. 336, 68 L.Ed. 696 was specifically limited by the Court in *United States* v. *Morton Salt*,[68] where the Court held that both § 5 and § 6 of the FTC Act[69] must be read together in determining the powers of the FTC. Moreover, *Dean Foods* is a clear holding that the FTC possesses "ancillary powers" to the degree that they are necessary for the preservation of granted powers.[70]

[19,20] Nonetheless, in making a determination of the existence and scope of such a power, the Court must be guided by the limitations Congress has placed on the exercise of specifically granted FTC powers. Subpoena and discovery generally are limited by the requirements of court enforcement and to evidence shown to be relevant.[71] Where, as here, the order issued is under a newly claimed power and is not based on a specific grant or authorization, the Court must be satisfied that the use of such power is not inconsistent with other provisions of the Act.[72]

In light of the findings below, this Court need not now determine

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[68] *See* 338 U.S. at 652–53, 70 S.Ct. 357. The Court preserved *American Tobacco*, but limited it to those situations where the subpoena was regarded as sweeping too broadly, or where the material sought was not reasonably relevant to the matters within the scope of the agency's power. *Id.*

[69] 15 U.S.C. §§ 45, 46. The § 6 investigatory powers are broad indeed. See, *National Petr'm. Ref'rs.* v. *Federal Trade Comm'n.*, 157 U.S.App.D.C. 83, 482 F.2d 672, 678, 679 (D.C. Cir.1973); *Genuine Parts Co.* v. *Federal Trade Comm'n.*, 445 F.2d 1382, 1391 (5th Cir. 1971).

[70] *See* 384 U.S. at 607, 86 S.Ct. 1738.

[71] See *Morton Salt*, *supra*, 338 U.S. at 653, 70 S.Ct. 357; *Federal Trade Comm'n.* v. *American Tobacco Co.*, *supra*, 264 U.S. 298, 44 S.Ct. 336; *United States* v. *Associated Merchandising Co.*, *supra*, 261 F.Supp. at 558; *see also Federal Trade Comm'n.* v. *Dilger*, 276 F.2d 739 (7th Cir. 1960).

[72] *See, Heater* v. *Federal Trade Comm'n.*, 503 F.2d 321, 323–24 (9th Cir. 1974).

whether the Commission possesses as appropriately defined and limited power to order the preservation of documents.[73] It is sufficient to say that the question is a difficult one calling for the examination of constitutional rights as well as statutory powers. Since the findings upon which such an order must be based and the evidence to support those findings have not been spread on the record which the Court has before it, the proper exercise of judicial power is to await a clearer defining of the issue.[74]

C. Premises of Preservation Order

Assuming *arguendo* that the Commission has the power to issue a preserva[1379]tion order, under appropriate limitations, this Court is constrained to hold that the present record does not allow it to properly review the discretion of the Administrative Law Judge and the Commission, as that discretion was exercised in the present instance. The handicaps under which the Court would labor are several, only a few of which need to be set out in detail.

[21,22] In the first instance, a preservation order, as any other order, must rest initially on the facts presented to the adjudicative official. That official in turn must examine the facts presented, under the guidance of the proper burden of proof, and make such findings on the record as will make clear what is being ordered in light of what the facts support. Here, the motion presented to the Administrative Law Judge did not even assert that the documents were relevant, nor go on to describe their relevance or potential relevance.[75] Nor did the support for the motion, at least insofar as that support is available to this Court, show that the documents alleged to be to some degree potentially relevant were in fact endangered by the document "retention" programs.[76] The attempt by the Complaint Counsel and

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[73] *Cf.*, *Fairbanks* v. *Hardin*, 429 F.2d 264, 268 (9th Cir. 1970). Even Federal Courts, though granted great powers to control their own proceedings and possessing equity powers that stretch broadly, have used preservation orders only reluctantly and under limits of both time and relevancy, see *United States* v. *Firestone Tire and Rubber Co.*, Civ.A. No. C. 73-836 (N.D.Ohio, Nov. 28, 1973) (order preserving "potentially relevant" documents for 90 days while exempting all routine business forms); or only by stipulation, *United States* v. *International Bus. Mach. Corp.*, 58 F.R.D. 556 (S.D. N.Y.1973); *United States* v. *General Tire and Rubber Co.*, Civ. No. 67-155 (N.D.Ohio, Oct. 6, 1967).

It should be noted that this Court expresses no view on the power of federal courts to issue such orders. *But see Humble Oil & Ref'g. Co.* v. *Harang*, 262 F.Supp. 39 (E.D.La. 1966).

[74] The Court thus deems the issue of the power of the Commission to promulgate the order to be unripe at this time, though the remaining issues are ripe.

[75] Complaint Counsel's request as made in the Motion of Nov. 8, 1974 was as follows: "During the course of the initial non-substantive depositions taken in this proceeding, it was determined that all eight respondents engage in the systematic destruction of business documents, *many of which may be relevant* to this proceeding * * * While Complaint Counsel imply no position on the propriety of such destruction programs when utilized in the normal course of business, their continuance after an anti-trust action has commenced may well constitute a violation of the law. At the very least, broad destruction programs inevitably preclude a complete discovery of the facts." *Motion*, *supra*, at 1, 2 (footnote omitted)(emphasis added). Complaint Counsel went on to assert that the function of the Order was to allow the agency to make the final determination of what was relevant. *Id.*

[76] The *Motion*, *supra*, stated that the companies engaged in "systematic document destruction programs," and cited to depositions, evidently of corporate officers. This Court has not been given those deposition pages, and on those grounds alone finds decision on the exercise of the discretion to be impossible. The Court moreover has been informed

(Continued)

the Administrative Law Judge to shift the burden of proof to the oil companies to show that the documents in question were not relevant is proscribed by the Administrative Procedure Act[77] and the Commission's own regulations.[78] The Commission cannot therefore be allowed to argue that the failure to make these findings is harmless. See 5 U.S.C. § 557(c).

[23] This Court is unable to review with the requisite deference to agency expertise and discretion the Order issued here. Therefore, this Order must be vacated and remanded to the Commission for further findings. Such a proceeding will allow Complaint Counsel to put on the record the necessary facts, and allow the officials to make the appropriate findings as to which document categories are relevant, even under the looser administrative evidentiary standards;[79] why these document categories are endangered; and how long a period of time it is reasonable to preserve the documents in order to allow the agency to subpoena them. Moreover, the Administrative Law Judge and the Commission could then make clear, after an opportunity for the parties to address the question, the exact basis upon which the Commission might rest such a power. In **[1380]** addition, of course, if the oil companies wish to pursue their request that other governmental agencies be required to preserve documents, they could raise and attempt to support such a request before the appropriate officials.

This Court finds:

(1) That the motions of the Defendant, Federal Trade Commission to dismiss the pending action must be denied.

(2) That the motion for summary judgment in favor of the Plaintiffs must be denied.

(3) That the Order issued by the Federal Trade Commission is vacated, and these proceedings remanded to the Commission.

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by counsel that the depositions cited by Complaint Counsel say only that such programs exist, and do not discuss their scope in relation to particular documents or categories of documents. *See* Tr. of Oral Arg. at 65. It is clear that neither the Administrative Law Judge nor the Commission made findings that certain categories of documents, potentially relevant to specifications of the complaint, were in fact endangered by a program of unknown scope.

[77] *See*, 5 U.S.C. § 556(d). This shift is seen in the remarks of the Administrative Law Judge in the Transcript of the Hearing *supra*, n. 7 at 324.

[78] 16 C.F.R. § 3.43.

[79] Agencies are not restricted to the rigid requirements of rules of evidence, and those rules are not controlling as to admissibility. See *Federal Trade Comm'n* v. *Cement Institute*, 333 U.S. 683, 705–06, 68 S.Ct. 793, 92 L.Ed. 1010 (1948).

RETAIL CREDIT CO. v. FEDERAL TRADE COMMISSION et. al.*

Civ. A. No. 75–0895. F.T.C. Docket No. 8920.

(United States District Court, District of Columbia, February 2, 1976)

In a Freedom of Information Act motion for discovery of documents withheld by the Federal Trade Commission, after an *in camera* inspection of a random sample of the documents, court held that memoranda from independent Commissioners and the Bureau of Competition concerning proposed actions were plainly exempt from disclosure, but exemption claims in certain other instances were unmerited. Where justification and indexing for denied documents were insufficient, the agency was required to provide a more complete document index.

J. Wallace Adair, Francis A. O'Brien, and *Kenneth E. Krosin,* of *Howrey & Simon,* Washington, D.C. (*Kent E. Mast,* of *Hansell, Post, Brandon & Dorsey,* Atlanta, Ga. of counsel) for plaintiff.

Robert J. Lewis, Gen. Counsel, *Gerald P. Norton,* Deputy Gen. Counsel, *Gerald Harwood,* Asst. Gen. Counsel, *Jeffrey S. Edelstein,* Atty., *Earl J. Silbert,* U.S. Atty., *Robert N. Ford,* Asst. U.S. Atty., and *Ann S. Duross,* Asst. U.S. Atty., Washington, D.C., for defendants.

Before JONES, *Chief Judge.*

MEMORANDUM AND ORDER

In this Freedom of Information Act case, Retail Credit Company has requested documents from the Federal Trade Commission "relating to the credit reporting industry, Retail Credit Company, and the Commission's investigation and prosecution of plaintiff in F. T. C. Docket No. 8920." Complaint ¶7. The request, according to the FTC, encompasses approximately 20,000 pages of documents, of which 17,000 have been released in full to Retail Credit. Approximately 3,000 pages, comprising approximately 620 documents, have not been released in whole or in part, and these documents are at the center of this litigation.

On June 27, 1975, Retail Credit moved for partial summary judgment to require the FTC to compile and produce a *Vaughn* v. *Rosen* index. On July 3, 1975, the FTC made its cross motion for summary judgment, simultaneously filing an "Index of Documents Withheld" which it contends supports its motion and answers plaintiff's earlier motion. All discovery was stayed on July 7, 1975, pending determination of these motions, and on July 10, 1975, the FTC filed a corrected index to account for certain errors in the first index.

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶60,727 at 68,124 (1976-1 Trade Cases).

The Index of Documents Withheld divides the documents into seventeen different categories, and with exceptions to be noted later, individually describes each document within each category, as well as the exemption claimed for each. On December 12, 1975, the Court ordered the FTC to produce for *in camera* inspection certain documents which the Court selected as a random sampling of documents in each of the seventeen categories. The Court further ordered the FTC to provide supplemental factual justification for documents, disclosure of which the FTC contends is precluded by exemption 4, in accordance with *Pacific Architects & Engineers, Inc.* v. *Renegotiation Board*, 505 F.2d 383, 385 (D. C. Cir. 1974). The documents and factual supplementation have been produced, and the Court is of the opinion that it can now adequately rule on the adequacy of defendants' Index and the merits of the pending motions.[1]

Category I—Interview Reports Received From the Justice Department Concerning Retail Credit Company

There are six items, or groups of items, in this category, two of which have been submitted for inspection. After inspection of the submitted documents, it is clear that the Index is clearly conclusory and inaccurate, and that the claims of exemption must be justified in more detail. Moreover, with regard to certain of the items, no claim of exemption is valid.

First, the Index describes these reports as containing "analyses and evaluations of presentations made by officials or representatives of Retail Credit Company through the Department of Justice." With rare exception, this statement is inaccurate. The reports submitted, in the main, contain a summary of the statements of the interviewed persons. No analysis of those statements is made; indeed, the tone of each report makes it appear that the reporter saw his job as merely transcribing, in summary form, the statements of the interviewees. No statements of the interviewers are given, and only rarely is the information given by the interviewee related to information known to the interviewer. With these rare exceptions (see items I–1(a), pp. 2 & 4; I–1(g), p. 1), the FTC's claim of exemption 5 is without merit.

To the extent that the FTC claims exemptions 7(A) and 7(D), greater justification is necessary. Exemption 7(A) protects from disclosure "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings." In order for the Court to determine whether this exemption applies, the FTC must provide

[1] As will appear later, the Court has determined that the Index in certain respects is deficient. Such a determination cannot properly be made in a vacuum, and thus the Court delayed ruling on the adequacy of the Index until the random sampling of documents was produced for *in camera* inspection.

specific factual and evidentiary material supporting its claims (1) that the documents were compiled for law enforcement purposes and (2) that disclosure would interfere with enforcement proceedings. With regard to the latter category of information, the FTC should submit specific factual and evidentiary material showing (1) the present stage of the enforcement proceedings; (2) future stages, both possible and certain to occur; (3) *in nonconclusory terms*, the effect that disclosure would have on the FTC's ability to pursue and act in those proceedings, both present and future.

Exemption 7(D) protects from disclosure in pertinent part "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (D) disclose the identity of a confidential source."[2] In determining whether this exemption should apply to these interview reports, the legislative history of the 1974 amendments is instructive. The conference report states:

> The substitution of the term "confidential source" in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. Conference Report 93–1200, 1974 United States Code Congressional and Administrative News, at 6227.

Thus, with regard to each confidential source, the FTC must provide specific factual and evidentiary information to the Court in support of its claim either (1) that there was an express assurance of confidentiality made to the source or (2) that the circumstances leading to provision of the information by the source would lead a reasonable person to believe that his identity would remain confidential.

Finally, it should be obvious that the FTC cannot claim exemption 7(D) with regard to documents which are simply reports of meetings which the Justice Department had with Retail Credit officials. Clearly the FTC is in no danger of losing Retail Credit as a "confidential source," even assuming that it once was one, by disclosing the summaries of meetings between Retail Credit and the Justice Department.

Category II—Bids

The FTC has represented to the Court that documents heretofore withheld in this category under authority of exemption 4 have been made available to Retail Credit. Def. Supp. Submission, Affidavit of

[2] The remainder of the exemption is inapplicable to the FTC which is not a "criminal law enforcement authority" or to an "agency conducting a lawful national security intelligence investigation."

Jeffrey S. Edelstein ¶ 7. Retail Credit's claims with regard to these documents are therefore moot.

Category III—Commission Minutes

The four samples of commission minutes of meetings evidence simple staff directives to take certain action on particular cases. No "policy determinations" are given, nor is there any other final action which might be described as "secret law" within the FTC. If any of the minutes evidenced such policy determinations, they certainly would be disclosable under 5 U.S.C. § 552(a)(2). See *Ash Grove Cement Co.* v. *FTC*, 511 F.2d 815, 818 (D.C. Cir. 1975). The internal staff directives, however, do not reflect policy or law within the agency and to that extent are exempt from disclosure. *Ash Grove Cement, supra.*

The Index submitted by the FTC in this category, however, is clearly insufficient. The description of the minutes is almost identical to the description submitted by the FTC in *Ash Grove Cement Co., supra.* The Court of Appeals there held the description "clearly conclusory" under prior case law. 511 F.2d at 818. Thus, in order for this Court to determine whether the remainder of the commission minutes are similar in content to the minutes already submitted, the FTC must reindex category III to particularly describe *each* of the minutes.

Category IV—Draft Documents and Notes

The FTC has withheld these documents from disclosure pursuant to exemptions 5 and 7(A). Whether exemption 7(A) applies need not be determined, since the documents within this category are clearly exempt under exemption b(5).

The Court of Appeals has observed that exemption 5 does not protect only deliberative *materials;* its more fundamental purpose is to protect the deliberative *process.* See *Montrose Chemical Corp.* v. *Train*, 491 F.2d 63, 69 (D.C. Cir. 1974). If any documents should be withheld as part of the deliberative process, drafts of memoranda showing changes in staff thought processes should be. In *Bodner* v. *FTC*, C.A. 74–1189 (D.D.C. Feb. 24, 1975), Judge Flannery withheld a draft of a document which the FTC eventually issued to the public. Judge Flannery stated that such drafts "clearly constitute a part of the deliberative process that is designed to be protected by exemption 5." Slip Op. at 12. Moreover, he observed that such a draft version "is not likely to reflect accurately the Commission's deliberations or final decision." *Id.* Thus, the possibility of withholding agency law is minimized. The draft documents in Category IV are not even drafts of documents eventually issued by the Commission. Rather, the documents submitted are drafts of memoranda eventually presented to the Commission for delibera-

tion. The information contained in the drafts at issue, therefore, is not one, but two, steps away from a final agency decision. There is even less possibility, therefore, of withholding secret agency law.

Item 5 submitted to the Court includes notes by staff members on the status of the credit industry investigation, including notes on where certain files are, where certain computer cards can be located, and persons who should be contacted. These notes do not reflect recommendations, policy considerations, or observations on trial strategy, which are at the heart of the rationale for exemption 5. However, they are part of the deliberative *process* protected by *Montrose Chemical, supra*. They do not reflect any "secret law" of the agency, and thus the public has no real interest in discovering them. See *NLRB* v. *Sears, Roebuck*, 421 U.S. 132, 151–52 (1975).

In light of the conclusion that draft documents and staff notes are *per se* exempt under exemption 5, the Index, although it describes the documents in a rather summary form, is adequate.

Category V—Miscellaneous Routing Slips

The routing slips withheld under this category are one-page memo forms which individual commissioners or staff members use to transmit study memoranda to other commissioners or staff members. These slips are utilized by the transmittor to state his or her views with respect to the attached memorandum. With regard to each of the slips, the FTC claims exemption 5 as justification for nondisclosure.

With the exception of item 1(c), all the slips submitted to the Court reflect rather frank views of the transmittor regarding the transmitted memorandum. Item 1(c) is a simple message of transmission with no opinion or observation made by the transmittor. This of course, would be subject to disclosure. If there are other transmittal slips similar to item 1(c), they also would be subject to disclosure. Whether the Index should be redone to account for similar transmittal slips is questionable. The description of these routing slips adequately describes their content, with this one exception, which appears to be an inadvertent oversight. Rather than reindexing, the FTC must review all transmittal slips in this category to insure that slips similar in content to item 1(c) have been disclosed; if not, they should be disclosed immediately.

Category VI—Inter-Agency Correspondence

Items 2 and 3 submitted to the Court reflect correspondence between the FHA and the FTC concerning the FHA program for obtaining credit information on potential FHA mortgage applicants. The first item is a list of questions propounded by the FTC to the FHA which

would elicit information concerning FHA practices. The second document is a summary of a meeting between FTC and FHA officials concerning the information given in response to those questions. The FTC claims both documents exempt under exemption 5.

The first document reflects the deliberative process of the FTC in that it reveals the area of concern through the questions asked. Exemption 5 would protect such material. The second document essentially reflects the FTC's *analysis* of the information given it by the FHA. Part of this document is a list of contract sources for FHA credit reports. Under *Montrose Chemical, supra,* statistical summaries by agency staff are exempt from disclosure as part of the deliberative process. The Court of Appeals made a point of the fact that the information contained in the summaries was public record, however. 491 F.2d at 70-71. It is not clear whether such is the case here. The FTC must therefore satisfy the Court that the information in the summaries is of public record, or is otherwise exempt from disclosure.[3] As the Court in *Montrose Chemical* stated:

> If we confront a case in which some facts are *only* found in the aide's memorandum, then the principles of *Vaughn* v. *Rosen* and *Cuneo* v. *Schlesinger* would be applicable, i.e., the Government would bear the burden of putting the record in such shape that all facts are in the public record, separate from the analysis which need not be disclosed. 491 F.2d at 70–71.

The remainder of Category VI need not be reviewed by the Court. Each document's description reveals that it contains recommendations or analysis similar to that contained in items 2 and 3. Having examined those documents and found them exempt under b(5), with one exception not applicable to the other documents, and having found the descriptions of those documents accurate, the Court may justifiably approve FTC's nondisclosure of the other documents. See *Ashgrove Cement, supra,* at 817.

Category VII—Confidential Source Correspondence

The Index under this category must be redone. The FTC claims that exemptions 7(C) and 7(D) justify nondisclosure. Exemption 7(C) protects from disclosure investigatory records compiled for law enforcement purposes if disclosure would constitute an unwarranted invasion of privacy; exemption 7(D) in pertinent part (see footnote 2) from disclosure such records if they would disclose the identity of a confidential source.

The Court has earlier discussed the information necessary to a

[3] The FTC cited the confidential source exemption as a further justification for withholding this document. Certainly the FHA cannot be a confidential source. If the FTC intended to denominate the companies whose names were given by the FHA in its report to the FTC, the confidential source exemption would not apply since the companies are not the persons supplying the information as "sources."

rational determination of the application of exemption 7(D). See discussion of Category I, supra. That discussion applies with equal force to the FTC's claim of exemption 7(D) here.

Exemption 7(C) is closely patterned on exemption 6, which precludes disclosure of information which would constitute a clearly unwarranted invasion of personal privacy. The Court of Appeals, in *Getman* v. *NLRB*, 450 F.2d 670 (D.C. Cir. 1971), outlined the considerations relevant to determining whether disclosure would constitute a clearly unwarranted invasion of privacy. First, the Court must determine whether there is an invasion of privacy and if so, how serious an invasion. Against this invasion of privacy, the Court must analyze and weigh the public interest in disclosure for the purpose which the plaintiff will use the information. It is not simply the public's interest in disclosure, but the public's interest in the use to which the plaintiff will put the information, which must be considered. 450 F.2d at 674–75. The latter task is for the Court. With regard to the former, in order for this Court to determine whether the confidential source correspondence in Category VII is exempt from nondisclosure, the agency must, with regard to each document provide specific factual and evidentiary material explaining why disclosure would constitute an invasion of privacy and the extent of the invasion. This has not been done.

The Index in its current state is clearly conclusory:

> Sixty-six letters to and from confidential sources dealing with sensitive information about the credit reporting industry.

In reindexing this category, the FTC must provide the information indicated by the Court with regard to *each* letter in a particularized non-conclusory manner.

Category VIII—Material Submitted to the Commission by Confidential Sources

The documents in this category are withheld variously on the authority of exemption 4, 5, 7(A) and 7(D).

With regard to the claim of exemption 4 for item VIII-3, the affidavits submitted by the FTC adequately comply with the requirements of the Court's order. They show that the financial data given by the O'Hanlon Company would not normally be given to the public, would severely harm the competitive position of the company, would discourage it from giving such information in the future, and cannot be given with simple deletion of names, since the information on the report or the report form itself, would disclose O'Hanlon's identity. Thus exemption 4 prevents disclosure of item VIII-3.

Item VIII-2 submitted to the Court is described as "drafts and notes." Certainly, as noted in the prior discussion herein, if these

documents are drafts or notes of the staff, exemption 5 would preclude disclosure. However, the document submitted to the Court as item VIII-2 is not a draft, or does not appear to be a draft. The document is unlabeled, but appears to be a memorandum presented to a court with regard to Retail Credit. The Index must be redone, therefore, to *properly* describe the documents. All of Category VIII must be reindexed since the Court cannot accept at face value the descriptions of the other items, and further because the other descriptions are conclusory at best (e.g., "financial and commercial data," "information that would reveal trial strategy").

Finally, with regard to the claim of exemptions 7(A) and 7(D), the information necessary to justify these claims is not provided. The FTC must provide such information in accordance with the views set forth in the Court's discussion of Category I.

Category IX—Partially Exempt Correspondence

The documents in Category IX present the largest single block of documents submitted to the Court. For the most part, they represent correspondence between the FTC and persons complaining about treatment received from credit agencies, correspondence between congressmen and their constituents complaining of such treatment, and letters between the FTC and congressmen or state agencies which have acted as conduits for complaints given them by state residents. The documents disclose alleged drinking habits or financial problems of each complainant. The only portions of any of these documents which have been deleted are the names and addresses of the individual complainants, and in rare instances, substantive material from the complainant's letter which would enable the reader to ascertain the complainant's identity.

The FTC claims justification for the deletions rests in exemption 5, 7(C) and 7(D). The claim of exemption 5 is frivolous; deletion of names and addresses of complainants certainly is unconnected with protection of intra-agency communications. The claim of exemptions 7(C) and 7(D) is more substantial and would be dispositive if the Index were more specific. Exemption 7(C) protects from disclosure information compiled for law enforcement purposes which if made public would constitute an unwarranted invasion of personal privacy. Most of the complaints disclose the complainant's past drinking practices or financial difficulties, which if linked to the complainant would clearly constitute a serious invasion of his privacy. Moreover, the use to which Retail Credit could or would put such information would not justify such an invasion. Under *Getman* v. *NLRB*, *supra*, the Court would be fully justified in upholding the FTC's nondisclosure of these names and

identifying material. Any further justification, as requested in Category VII, *supra*, would be unnecessary.

The inquiry cannot stop here, however, since certain documents in the first and second sections of this category are not from complainants, disclosure of whose names would invade their personal privacy by revealing such personal information. For example, items 1(A), 1(B) and 1(C) clearly do not relate to a complainant's personal or financial problems. They only discuss acquisition of information or are responsive to inquiries made. With regard to correspondence such as these items, the FTC must justify its claim of exemptions 7(C) or 7(D) in the manner prescribed by the Court in its discussion of Categories I and VII.

To facilitate management of this category, all items in sections 1 and 2 must be described with particularity, and the supporting factual and evidentiary material must be given in each instance. The Court finds the deletions in Section 3 of this category fully justified under exemption 7(C) and without need of further indexing.

Section 4 is a letter from the Bureau of Competition to the Justice Department. According to the Index, it has been released "except for names of confidential sources." The document submitted to the Court indicates no deletions, as required by the December 12, 1975 order, and in fact no "names" are found in the letter. In addition to the supplemental index to be required herein, the FTC must resubmit this item in accordance with the December 12, 1975 order.

Category X—Memoranda to the Commission from the Individual Commissioners

A review of the memoranda submitted to the Court show they are clearly exempt from disclosure under exemption 5. They contain the thoughts, observations, and recommendations of the commissioners relating to action not as yet taken by the FTC. They are not explanations of prior actions, nor are they embodiments of Commission policy. Thus, there is no danger of withholding secret law, and there is every reason to protect the thought processes of the commissioners, who are the highest members within the Commission. See *Sterling Drug* v. *FTC*, 450 F.2d 698, 708 (D. C. Cir. 1971). To be sure, if these memoranda represented Commission decisions, viewpoints or explanations, they would not be exempt. But the views of the individual commissioners with regard to a Commission decision to be made in the future is of a different nature, and intended to be protected by exemption 5.

The descriptions in the Index to the effect that a particular document represents an "opinion," "recommendations," or a "discus-

sion" of a certain issue is adequate, particularly in light of the Court's verification of the accuracy of three of the nine documents.

Category XI—Memoranda to the Commission from the Bureau of Competition

A review of these memoranda also show they are clearly exempt under exemption 5. They contain the analysis, observations, and recommendations of the staff with regard to the credit investigation, and with particular regard to proposed actions. Thus, they are part of the deliberative process and need not be disclosed.

For the same reasons articulated in the discussion of Category X, the Index of Category XI is adequate.

Category XII—Memoranda to the Commission

The observations with regard to Category X and XI apply equally to this category. A review of the documents submitted has verified the accuracy of the description and the propriety of nondisclosure under exemption 5.

Category XIII—Partially Exempt Memoranda to the Commission

The deletions submitted to the Court are fully justified under exemption 5, for the reasons articulated in discussion of the previous three categories. Also for the reasons heretofore stated, the Index is fully adequate.

Category XIV—Memoranda

A review of the submitted documents demonstrates they contain observations and thoughts of the staff with regard to proposed action. Thus, they are exempt under exemption 5 and there is no need to reach the FTC's claim of exemption 7. For the reasons heretofore stated, the Index of this category is fully adequate.

Category XV—Partially Exempt Memoranda

Item 3 submitted to the Court is primarily a relation of prior action by the staff, the reasons for the actions, and in some instances criticism of the actions taken. To the extent that the discussion relates to prior action, a more difficult question of exemption under b(5) arises, different from the situation in Categories X, XI, XII, XIII, and XIV, where the material related to future action. Nonetheless, nondisclosure is mandated here under the teaching of *NLRB* v. *Sears, Roebuck*, 421 U.S. 132 (1975).

The Supreme Court in *Sears* distinguished between predecisional and postdecisional memoranda for purposes of nondisclosure under exemption 5. The Court noted that Congress was primarily concerned with disclosure of "secret law" in its debates over exemption 5, and therefore the guiding principle in determining whether memoranda should be disclosed, even though it contains the thoughts of the writer, should be whether nondisclosure will protect "secret law." Thus, in *Sears*, memoranda which explained the basis for the agency's decision to *issue* a complaint was not disclosable, since issuance of a complaint did not represent a final agency decision which could be construed as "secret law." On the other hand, the decision *not* to issue a complaint represented final agency action, and any explanation by the agency of such nonaction could be construed as "secret law." Such memoranda were not, according to the Court, protected by exemption 5. 421 U.S. at 151-53.

In the instant case, the explanation of past staff action is exempt under the *Sears* rationale for two reasons. First, the explanations, discussions, and criticisms relate to staff, not Commission action. Second, the actions discussed were procedural or tactical actions taken during the credit investigation. These actions by no means represent "secret law" and therefore the public has only a marginal interest in its disclosure. Item 3 therefore was properly withheld from disclosure.

The descriptions of the remainder of the documents lack the adequacy necessary for the Court to make a proper determination as to the justification for nondisclosure. Particularly, items 1, 6, 7, and 9 do not reflect any inclusion of recommendations or observations by the staff. They could be purely factual collections and thus disclosable. The Index of Category XV, therefore, must be redone to reflect with particularity and in a non-conclusory manner the content of each document.

Category XVI—Miscellaneous Documents

The Index for this category must also be redone. First, items 1, 3, and 9 are withheld on the authority of exemptions 7(A) or 7(D). The information supporting such claims, as discussed with regard to Category I has not been provided. Therefore the Index must be redone to reflect the information necessary to justify the claims.

Items 4, 5, 6, 7, and 8 are withheld on the authority of exemption 5, and yet none of the descriptions of the documents state that there are recommendations or analysis of Commission personnel which should not be disclosed. Rather, one description states that the item is a "list of small chain credit bureaus." But the Court is left without any knowledge as to who prepared it, what date it was prepared, or for what purpose it was prepared. These questions are left unanswered by

the descriptions of the other items as well. This is not the same as Categories X and XI, where the descriptions stated whom the memoranda were from, to whom they were sent, the date, and in general terms the nature of the subject matter and content. The description is simply too conclusory to allow the Court to determine the sufficiency of the claim of exemption, even with *in camera* inspection.

Category XVII—Partially Exempt Miscellaneous Documents

After review of the four items submitted *in camera*, the Court finds, with one exception, that the Index adequately and accurately reflects the deletions, and that the deletions are justified by exemption 5. Item 2 was released except for the staff's definition of a particular company's market control, which clearly meets exemption 5's requirements. Item 5 was released except for the conclusions of the author regarding policy determinations to be made. Item 13 is to the same effect. The descriptions in the Index are to the same effect. The remainder of the document descriptions can, therefore, be accepted at face value. With one exception, the materials deleted were margin notes, which as discussed earlier are exempt as part of the deliberative process, or staff policy analysis, also exempt under b(5).

The only deletion in item 7, however, is a confidential source name, withheld under authority of exemption 7(D). With regard to item 7, therefore, the FTC must provide the information as described in the prior discussion of Category I.

In light of the foregoing, it is this 2nd day of February, 1976, without a hearing pursuant to Local Rule 1-9(f),

Ordered that defendants undertake the following action with regard to each category in its "Index of Documents Withheld":

Category I

(1) Resubmit a proper index accurately describing in non-conclusory terms each interview report, and identifying with particularity those portions of each report the defendants claim exempt from disclosure under 5 U.S.C. § 552(b)(5);

(2) Identify with particularity which documents or portions of documents the defendants claim exempt from disclosure under 5 U.S.C. § 552(b)(7)(A), and with regard to each claim, provide to the Court specific factual and evidentiary material supporting the claims (a) that the documents were compiled for law enforcement purposes and (b) that disclosure would interfere with law enforcement proceedings, including material showing the present stage of the proceedings, future stages, both possible and certain to occur, and in non-conclusory terms the effect that disclosure would have on the FTC's ability to pursue and act in those proceedings, both present and future;

(3) Identify with particularity which documents or portions of documents the defendants claim exempt from disclosure under 5 U.S.C. § 552(b)(7)(D), and with regard to each claim, provide to the Court specific factual and evidentiary material supporting the claims (a) that the documents were compiled for law enforcement purposes and (b) that there was an express assurance of confidentiality made to the source or (c) that the circumstances leading to provision of the information by the source would lead a reasonable person to believe that his identity would remain confidential.

Category III

Resubmit a proper Index accurately describing in non-conclusory terms each Commission minute and providing detailed justification for nondisclosure of each.

Category V

Review all transmittal or assignment slips and disclose promptly to plaintiff all slips similar in content to Item V–1(c).

Category VI

Submit to the Court specific factual and evidentiary material demonstrating that the information contained in the summary of contract sources in Item VI–3 is otherwise available to the public.

Category VII

(1) Resubmit a proper Index accurately and adequately describing each letter, and identifying with particularity those letters or portions of letters the defendants claim exempt from disclosure under 5 U.S.C. § 552(b)(7)(C) or (b)(7)(D);

(2) With regard to each claim of exemption under (b)(7)(C), provide specific factual and evidentiary material explaining why disclosure would constitute an invasion of privacy, and the extent of such an invasion;

(3) With regard to each claim of exemption under (b)(7)(D), provide the material similarly required by this order for the documents withheld in Category I.

Category VIII

(1) Resubmit a proper Index, with the exception of item VIII–3, accurately and adequately describing *in non-conclusory terms* each document the defendants claim exempt from disclosure under 5 U.S.C. § 552(b)(5), (7)(A), or 7(D);

(2) With regard to each claim of exemption under (b)(5), provide detailed justification for each claim;

(3) With regard to each claim of exemption under (b)(7)(A), provide the material similarly required by this order for the documents withheld in Category I;

(4) With regard to each claim of exemption under (b)(7)(D), provide

the material similarly required by this order for the documents withheld in Category I.

Category IX

(1) Resubmit a proper Index accurately and adequately describing each document or portion of a document in sections 1 and 2 of this Category the defendants claim exempt from disclosure under 5 U.S.C. § 552(b)(7)(C) and 7(D);

(2) With regard to each claim of exemption under (b)(7)(C), provide the material similarly required by this order for the documents withheld in Category VII;

(3) With regard to each claim of exemption under (b)(7)(D), provide the material similarly required by this order for the documents withheld in Category I.

Category XV

(1) Resubmit a proper Index, with the exception of item XV–3, accurately and adequately describing *in non-conclusory terms* each document or portion of each document the defendants claim exempt from disclosure under 5 U.S.C. § 552(b)(5), 7(A), or (7)(D);

(2) With regard to each claim of exemption under (b)(5), provide detailed justification for each claim;

(3) With regard to each claim of exemption under (b)(7)(A), provide the material similarly required by this order for the documents withheld in Category I;

(4) With regard to each claim of exemption under (b)(7)(D), provide the material similarly required by this order for the documents withheld in Category I.

Category XVI

(1) Resubmit a proper Index accurately and adequately describing *in non-conclusory terms* each document or portion of a document the defendants claim exempt from disclosure under 5 U.S.C. § 552(b)(4), (5), 7(A), 7(C), or 7(D);

(2) With regard to each claim of exemption under (b)(5), provide detailed justification supporting each claim;

(3) With regard to each claim of exemption under (b)(7)(A), provide the material similarly required by this order for the documents withheld in Category I;

(4) With regard to each claim of exemption under (b)(7)(C), provide the material similarly required by this order for the documents withheld in Category VII;

(5) With regard to each claim of exemption under (b)(7)(D), provide the material similarly required by the order for the documents withheld in Category I.

Category XVII

With regard to Item 7, provide the material similarly required by

this order for claims of exemption under 5 U.S.C. § 552(b)(7)(D) for documents in Category I. Failure to provide such material or take such action required by this order within thirty days from the date of this order will be treated as a withdrawal by defendants of their claims of exemption for the documents affected.

ASHLAND OIL, INC. v. FEDERAL TRADE COMMISSION, et. al.*

Civ. No. 75-1956 F.T.C. File 99-268

(United States District Court for the District of Columbia, February 2, 1976)

1. NATIONAL GAS RESERVE ESTIMATES SUBMITTED IN RESPONSE TO F.T.C. ORDER WERE "TRADE SECRETS" PROTECTED BY PROVISION OF F.T.C. ACT.

   Natural gas reserve estimates which were submitted by oil company to Federal Trade Commission in response to an order by that agency and which were compiled at considerable expense of company in order to enable it to successfully bid on federal natural gas leases in competition with other companies were "trade secrets" within provision of Federal Trade Commission Act empowering Federal Trade Commission to release any information, except trade secrets, as it deemed expedient in public interest.

2. LEGISLATIVE FUNCTION OF CONGRESS NECESSARILY IMPLIES ITS INVESTIGATORY POWER.

   The investigatory power of Congress is necessarily implied in the legislative function.

3. CONGRESSIONAL INVESTIGATORY POWER IS NOT UNLIMITED, ALTHOUGH PENETRATING AND FAR REACHING IN SCOPE.

   Although the investigatory power of Congress is penetrating and far reaching in scope, it is not unlimited.

4. IN EXERCISING ITS INVESTIGATORY POWER, THE PARAMETER OF CONGRESSIONAL INQUIRY MAY BE NO BROADER THAN THE LEGITIMATE SPHERE OF LEGISLATIVE ACTIVITY.

   The parameters of the inquiry made by the Congress in exercising its investigatory power may be no broader than the legitimate sphere of legislative activity.

5. CONGRESSIONAL AUTHORIZATION OF BROAD SUBJECT MATTER INVESTIGATION, EXISTENCE OF VALID LEGISLATIVE PURPOSE, AND PERTINENCE OF SPECIFIC INQUIRIES TO BROAD SUBJECT MATTER AREA ARE NECESSARY FOR PROPER ASSERTION OF CONGRESSIONAL INVESTIGATORY POWER.

   In order for the congressional investigatory power to be properly asserted in a particular case, investigation of broad subject matter area must be authorized by Congress, investigation must be pursuant to a valid legislative purpose, and specific inquiries must be pertinent to broad subject matter area.

6. COURT, IN DETERMINING WHETHER AN AREA IS SUBJECT TO INVESTIGATORY POWER OF HOUSE SUBCOMMITTEE, MUST CONSIDER AUTHORIZING RESOLUTION AND RELEVANT RULES OF THE HOUSE, FULL COMMITTEE'S RESOLUTION AUTHORIZING SUBCOMMITTEE TO PROCEED, AND NATURE AND CONTEXT OF LEGISLATIVE PROCEEDING.

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* Reported in 409 F.Supp. 297 (1976).

In evaluating whether an area is subject to investigatory power of a House subcommittee, court must consider relevant rules of the House, as well as the authorizing resolution, the full committee resolution by which subcommittee was authorized to proceed, and nature and context of legislative proceedings.

7. SPECIFIC INQUIRIES NEED ONLY BE REASONABLY RELATED TO MAJOR SUBJECT MATTER AREA UNDER INVESTIGATION IN DECIDING PERTINENCY OF A CONGRESSIONAL INQUIRY.

In deciding pertinency of a congressional investigation, specific inquiries need only be reasonably related to major subject matter area under investigation.

8. SUBCOMMITTEE'S INVESTIGATION DIRECTLY RELATES TO AND FURTHERS LEGITIMATE FUNCTION OF CONGRESS.

Investigation by House subcommittee into national energy policy, natural gas supply production, need for emergency national gas legislation, and role of federal agencies in national energy affairs was directly related to and in futherance of a legitimate task of Congress.

9. SUBCOMMITTEE WAS ACTING UNDER CLEAR MANDATE OF THE FULL COMMITTEE AND THE HOUSE OF REPRESENTATIVES IN ISSUING ITS SUBPOENA TO THE F.T.C. FOR NATURAL GAS RESERVE ESTIMATES.

House subcommittee, in issuing its subpoena to Federal Trade Commission for natural gas reserve estimates filed by oil company, was acting under the mandate of the full committee and the House of Representatives to investigate within the sphere of legitimate legislative activity.

10. SUBCOMMITTEE'S INVESTIGATION WAS SUFFICIENTLY SHOWN TO BE A MATTER ON WHICH LEGISLATION COULD BE OBTAINED, BY THE ACT OF A FULL COMMITTEE AND THE HOUSE OF REPRESENTATIVES IN AUTHORIZING THE INVESTIGATION.

Act of the full committee and the House of Representatives in granting authority to the subcommittee to investigate natural energy policy, natural gas supply production, need for emergency natural gas legislation, and the role of federal agency in national energy affairs was itself sufficient to show that investigation upon which subcommittee had embarked concerned a subject on which legislation could be had.

11. PREVENTION OF EXISTING OR THREATENED INJURY, NOT MERELY AN INDEFINITE, FEARED INJURY, IS ONLY APPROPRIATE GROUND FOR GRANTING INJUNCTIVE RELIEF.

Injunctive relief is appropriate only to prevent existing or presently threatened injuries and will not be granted against something merely feared as liable to occur at some indefinite time in the future.

12. WHERE CLAIMED INJURY IS ONLY PROSPECTIVE AND MAY NEVER OCCUR, INJUNCTIONS WILL NOT BE GRANTED.

Injunctions will not be granted where the injuries complained of are prospective and may never occur.

13. PARTIES SEEKING INJUNCTION MUST SHOW THAT THE IMMINENCE OF THE INJURY IS SUCH THAT THERE IS A CLEAR AND IMMEDIATE NEED FOR EQUITABLE RELIEF TO PREVENT IRREPARABLE HARM.

The injury complained of by parties seeking an injunction must be of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.

14. UNLESS THE REQUIREMENT HAS BEEN SPECIFICALLY ELIMINATED BY

STATUTE, REQUIRED SHOWING OF IRREPARABLE HARM FOR AN INJUNCTION IS NOT ELIMINATED SIMPLY BECAUSE A CLAIM ALLEGES VIOLATION OF STATUTORY OR CONSTITUTIONAL RIGHTS.

The required showing of irreparable injury for an injunction is not eliminated simply by virtue of a claim alleging violation of statutory or constitutional rights, unless the requirement has been specifically eliminated by statute.

15. REASONABLE EXERCISE OF CONGRESSIONAL POWER AND DUE REGARD TO RIGHTS OF AFFECTED PARTIES BY CONGRESS MUST BE PRESUMED BY THE COURTS.

The courts must presume that the committees of Congress will exercise their powers responsibly and with due regard to the rights of affected parties.

16. INJURIES COMPLAINED OF ARE "PROSPECTIVE" IN NATURE RATHER THAN "PRESENTLY THREATENED" OR "IMMINENT".

Injuries complained of by oil company in event of natural gas reserve estimates submitted by it to Federal Trade Commission were turned over to House subcommittee in response to a subpoena were merely prospective in nature, rather than presently threatened or imminent, and were not such as to require permanent injunctive relief where transfer of such information would not lead inexorably to either public dissemination or disclosure to competitors, and isolated instances of breached confidentiality in past were insufficient to overcome continuing presumption of congressional propriety.

(Syllabus, with substituted captions taken from 409 F.Supp. 297)

On motion for preliminary and permanent injunctive relief, court held that congressionally subpoenaed documents were trade secrets protected by statute, but because subcommittee was acting under a clear mandate of the full committee and the House of Representatives and the perceived injuries resulting from the release of the subpoenaed documents to Congress by the F.T.C. were prospective in nature and not presently threatened nor imminent, motion was denied.

Ray S. Bolze and *Roger C. Simmons, Howrey & Simon*, Washington, D.C., for the plaintiff.

Jeffrey Axelrad, Dept. of Justice, and *William A.E. Doying*, F.T.C., Washington, D.C. for defendants F.T.C. and others.

Joseph A. Califano, Jr., Benjamin W. Heinman, Jr., and *Richard M. Cooper, Williams, Connolly & Califano*, Washington, D.C. for the intervenor-defendant John E. Moss.

I. BACKGROUND

A. The Action and Parties

[299] This civil action for declaratory and injunctive relief was commenced pursuant to Chapter 7 of the Administrative Procedure Act (5 U.S.C. § 701 *et seq.*) and 28 U.S.C. §§ 1331-32, 1337, 1361, 1651, and 2201-02. The amount in controversy, exclusive of interest and

costs, is in excess of $10,000. Venue properly lies in this district by virtue of 28 U.S.C. § 1391(e)(1).

The plaintiff, Ashland Oil, Inc. ("Ashland"), is incorporated under the laws of the State of Kentucky, with principal offices in Ashland, Kentucky. Plaintiff's business encompasses various aspects of the petroleum industry, including the exploration and development of oil and gas properties.

Defendant Federal Trade Commission ("FTC") is a federal regulatory agency established under, operating pursuant to, and administering the Federal Trade Commission Act ("FTC Act")(15 U.S.C. § 41 *et seq.*). Paul Rand Dixon, Acting Chairman of the FTC,[1] and Charles A. Tobin, Secretary, as well as FTC Commissioners M. Elizabeth Hanford and Stephen A. Nye, have been named as defendants in their official capacities.

John E. Moss is a member of the United States House of Representatives and Chairman of the Subcommittee on Oversight and Investigations of the House Interstate and Foreign Commerce Committee ("Subcommittee"). Congressman Moss has intervened of right in this action as party-defendant by virtue of Fed. R.Civ.P. 24(a) and House Resolution 899 (94th Cong., 1st Sess.).

B. Chronological Development of the Case

[300] On or about April 15, 1975, the FTC served upon the plaintiff a "Natural Gas Survey Special Report" order ("Special Report") issued pursuant to Section 6(b) of the FTC Act (15 U.S.C. § 46(b)). By this order, Ashland was required to file a "Special Report" and was advised that non-compliance would result in the imposition of penalties under applicable provisions of federal law. On August 27, 1975, Ashland responded by filing with the Commission a completed Special Report containing the information sought by the FTC. Included in the information submitted was highly sensitive competitive data detailing the company's reserve estimates for all of its natural gas leases and contracts nationwide.[2] Ashland's submission was accompanied by a letter from J. Creig Coogan, Vice President of Ashland Exploration Company (a division of Ashland Oil, Inc.) stating that the company's information on gas reserves was confidential and of a proprietary nature, such that disclosure would result in competitive injury and that such information was submitted to the Commission with the specific

[1] At the time of commencement of this action, Louis A. Engman was Chairman of the FTC and was named as a party-defendant. Upon Mr. Engman's subsequent resignation, Paul Rand Dixon became acting Chairman and has been substituted as party-defendant pursuant to Fed.R.Civ.P. 25(a)(1).

[2] The information contained in Ashland's Special Report included the locations and identities of plaintiff's natural gas leases, together with information revealing the percent ownership of various individuals in such leases and Ashland's internal estimates as to gas reserves in those leases. (*See* Affidavit of George C. Hardin, Jr., Plaintiff's Memorandum in Support of Motion for Preliminary Injunction).

reservation that plaintiff could claim its right to have the materials therein provided "accorded confidential treatment and be protected from disclosure." (Plaintiff's Complaint, Exhibit AA).

On October 6, 1975, Congressman John E. Moss, in his capacity as a member of Congress, requested the FTC to make available to him data gathered by the Commission pertaining to lease extensions on federal lands. (*Id.*, Exhibit A). By letter dated October 24, 1975, Charles A. Tobin, Secretary of the Commission, denied the Congressman's request for the reason that the data sought constituted "trade secrets and commercial or financial information [and] geological and geophysical information and data, including maps, concerning wells" which were exempt from mandatory disclosure under the Freedom of Information Act (5 U.S.C. § 552(b)(4) and (b)(9)). Consequently, Secretary Tobin concluded that the Commission was without discretion to release such exempt records. (*Id.*, Exhibit B).

On October 29, 1975, Congressman Moss sent a second request to the FTC, but this time in his official capacity as Chairman of the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce. (*Id.*, Exhibit C). Congressman Moss's letter noted that the Freedom of Information Act was not authority to withhold information from Congress,[3] and that this second request was made not in the Congressman's individual capacity, but "as Chairman of the Subcommittee on Oversight and Investigations" for the purpose of fulfilling the Subcommittee's general oversight responsibilities.

The FTC treated Congressman Moss's second letter as a formal Congressional request and, by letter of November 18, 1975, advised the Congressman that the natural gas reserve data which he requested would be furnished on November 28, 1975. In this reply, Chairman Engman cautioned that several of the companies involved considered the data "competitively very sensitive and might constitute trade secrets which the Commission is prohibited from making public under Section 6(f) of the Federal Trade Commission Act," and that the U. S. Geological Survey also was "of the opinion that this is confidential, proprietary information." He went on to mention that the Commission continued to be involved in litigation with companies refusing to provide such data under the **[301]** Special Report order. Therefore, Chairman Engman emphasized that:

> As a result, your Subcommittee will receive data only from those companies which have voluntarily complied with the Commission's orders. This fact is not lost upon companies faced with information requests from the Commission and will do little to encourage voluntary compliance, especially if any sensitive information is made public.

[3] *Cf.* 5 U.S.C. § 552(c).

Therefore, the Commission respectfully but strongly urges your Subcommittee to maintain the confidentiality of the information submitted in response to your request and in particular, the reserve estimates furnished in response to Question 5 of the Natural Gas Energy Study Order. (*Id.*, Exhibit D).

Ashland was advised of the Commission's decision on November 18, 1975. On November 21, 1975, plaintiff received written notice of the Commission's intention to disclose its reserve data to Congressman Moss's Subcommittee (*Id.*, Exhibit E). On the same day, Ashland was informed by telephone that the Commission intended to turn over the data to Congressman Moss on demand and would not be bound to the November 28th date mentioned in Chairman Engman's letter.

This action was filed on November 24, 1975, and on that date, plaintiff moved for and was granted a temporary restraining order enjoining the Federal Trade Commission from releasing the information in issue, thereby preserving the *status quo* until the Court considered the merits of Ashland's claims.[4]

On December 2, 1975, the Subcommittee authorized and the Chairman of the Interstate and Foreign Commerce Committee signed a subpoena *duces tecum* requiring FTC Chairman Engman to appear before the Subcommittee on December 3, 1975, and to bring with him any and all records within the Federal Trade Commission's control or custody or within the Federal Trade Commission's means to produce appertaining to or involving oil and/or gas lease extensions on Federal lands, including Ashland Oil, Inc. and including all correspondence between the Federal Trade Commission and Ashland Oil, Inc. relating in any manner to agreements or proposed agreements to hold such records confidential or to give advance notice of the release thereof. (*See* H.R.Rep.No.94–756, 94th Cong., 1st Sess., at 3–4 (1975)).

By letter of December 3, 1975, Chairman Moss informed Mr. Engman that the Subcommittee planned "no enforcement action of this subpoena until after the Court has considered" the questions arising in this case. (*Id.*, at 5).

On December 18, 1975, the House of Representatives assented to House Resolution No. 899. (121 Cong.Rec. 12, 918–919 (daily ed. December 18, 1975)). Section 1 of the Resolution provides:

Resolved That the chairman of the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce is authorized to intervene and appear in the pending action entitled "Ashland Oil Incorporated, plaintiff against Federal Trade Commission, et al., defendant," Civil Action 75–1956, United States District Court for the District of Columbia on behalf of the Committee on Interstate and Foreign Commerce *in order to secure information relating to natural gas reserves now in the possession of the*

[4] By stipulation among the parties, the Temporary Restraining Order remained in effect until February 3, 1976.

Federal Trade Commission for the use of the committee and the House. (Emphasis supplied.)

On January 16, 1976, after a hearing held in open court, we granted Congressman Moss's motion to intervene pursuant to Fed.R.Civ.P. 24(a).

Plaintiff has moved for preliminary and permanent injunction. Defendants Moss and FTC have filed motions for [302] summary judgment or, alternatively, to dismiss. The Court, *sua sponte*, advanced and consolidated the hearing on the merits of Ashland's complaint with that on its motion for preliminary injunction. *See* Fed.R.Civ.P. 65(a)(2).

C. Section 6(f) of the Federal Trade Commission Act

The principal arguments on the merits of this case focus on Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), which empowers the Commission

> *To make public* from time to time such portions of the information obtained by it hereunder, *except trade secrets and names of customers*, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith the recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use. (Emphasis supplied.)

Ashland maintains that the language employed is unequivocal in prohibiting disclosure of trade secrets by the FTC to any third party, including the Congress; that this construction is buttressed by the legislative history of the Act, by the wording and judicial interpretation of similar statutory provisions, and finally by the "historical position" of the Attorney's General's Office from 1909 to the present that such language ordinarily indicates an absolute prohibition against executive disclosures of proprietary data to the legislative branch, absent adequate assurances that confidentiality will be maintained.

In addition to specifically invoking confidentiality protection in submission of its reserve estimates to the FTC, Ashland states that it relied upon the belief that the Commission would abide by the mandate of Section 6(f), as well as the FTC's own rules, and refrain from divulging the materials in issue to Congress. Even if the FTC's disclosure to Congress is held pursuant to a lawful subpoena, plaintiff believes that the ultimate result will be a serious infringement of its common law and statutory rights, and a violation of its constitutional guarantees of equal protection, due process and freedom to petition the government.

Congressman Moss and the FTC respond that Section 6(f) clearly does not restrict Congressional access to trade secrets or other types of information collected by the FTC, since such a limitation upon the inherent investigatory power of Congress may not be imposed by

implication. The pertinent language of the Section—"to make public"—does not explicitly refer to Congress, and, thus, according to defendants' argument, cannot be read as an inhibition of Congress' statutory right to "annual and special reports" or its Article I subpoena power. Also relying on legislative history, defendants Moss and FTC conclude that the Commission was intended to be no more than an extension of the Congressional "visitorial power," at least in its information gathering function, and, therefore, a convenient storehouse of information readily accessible to the Congress.

In addition, defendants contend that the Subcommittee's subpoena and the underlying investigation of the natural gas industry are legitimate exercises of the powers conferred upon the Congress under Article I; and that once such constitutional powers have been legitimately invoked by a coordinate branch, the courts are bound to accord great deference and refrain from unwarranted interferences with on-going Congressional investigations. Defendants attempt to dispose of Ashland's remaining arguments in short order, contending that once a legitimate legislative purpose has been established, "Ashland's constitutional, statutory, and equitable arguments must fall before the legitimate assertion of the constitutional power of the Congress." (Intervenor's Memorandum in Support of Motion to Dismiss, p. 14).

II. ASHLAND'S NATURAL GAS RESERVE ESTIMATES

Since plaintiff endeavors to invoke common law and statutory protection for its reserve estimates, the Court must make a threshold determination whether such materials fall within the "widely relied-upon definition of a trade secret, found at 4 *Restatement of Torts* § 757, comment b (1939),"[5] *viz.*:

> A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which give him an opportunity to obtain an advantage over competitors, who do not know or use it. . . . 4 *Restatement of Torts* § 757, p. 5 (1939).

According to the *Restatement*, a more precise definition of what constitutes a trade secret is not possible. However, Comment b does enumerate a number of factors which may assist a court in determining whether particular data rises to the level of a trade secret:

> (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended

[5] *See Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 474-75, 94 S.Ct. 1879, 1883, 40 L.Ed.2d 315 (1974).

by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. 4 Restatement of Torts § 757, Comment b, p. 6 (1939).[6]

On the record before the Court, it is evident that Ashland's natural gas reserve estimates satisfy each of these criteria. The data in issue has been compiled at the considerable expense of "hundreds of thousands of man-hours and millions of dollars" and enables plaintiff to successfully bid on federal natural gas leases, in competition with "dozens of other companies." Consequently, such information is "highly valued and closely guarded," not only by Ashland, but throughout the natural gas industry. (*See* Affidavit of George C. Hardin, Jr., Plaintiff's Memorandum in Support of Motion for Preliminary Injunction).

Moreover, the agency with particular expertise in the regulation of natural gas, the Federal Power Commission ("FPC"), has explicitly recognized natural gas reserve estimates to be valuable, proprietary assets. For example, in *Amerada Hess Corporation*, 50 F.P.C. 1049, 1050 (1973), the agency observed:

> To begin with, it must be recognized that a natural gas company's reserve data, much like a patent or trade secret, constitutes a valuable and closely guarded asset. Making this asset available to competitors, without due compensation, would most certainly be inimical to competition, especially in highly competitive areas, as the comments of Ashland Oil, Inc. illustrate:
>
> > * * * Ashland Oil, Inc. has obtained leases in Federal off-shore areas by payments to the United States Government of large bonuses. Unleased acreage adjoins and offsets certain of these leases. If significant reserves are discovered and if the reserves extend into unleased areas, Ashland would not disclose the results of such exploration until an opportunity is available to bid in a drainage sale of the offsetting acreage. The information developed on such leases is highly confidential and proprietary in nature and disclosure of such information prior to the drainage sale would destroy Ashland's competitive advantage in bidding at such sale by making available to other companies the results of Ashland's exploration efforts made at great expense of it.

[304] Similarly determining such reserve data to constitute "valuable property" in *Reliability of Electric and Gas Service*, 49 F.P.C. 1428, 1429 (1973), the FPC discussed the underpinnings of its holding as follows:

> The policy reasons underlying our assurance of confidentiality are obvious. In a period when the gas supply shortage is most acute, disclosure of detailed reserve data would undoubtedly inhibit future exploration for new gas reserves since speculators and competitors could equally benefit from the geological and geophysical expenditures of other companies. A competitor would particularly benefit from knowledge of another producer's uncommitted reserves for particular locations, expecially in highly competi-

[6] This statement of the applicable test has received judicial approval. *See, e. g., Speedry Chemical Products, Inc.* v. *Carter's Ink Co.*, 306 F.2d 328, 331 (2d Cir. 1962).

tive areas. In addition, it would be extremely unfair to sellers of gas to disclose such data to potential buyers with whom they negotiate for the sale of gas. *Furthermore, we believe that certain reserve data constitutes a valuable property right which should not be taken without due process and just compensation.* (Emphasis added).

The federal courts have also acknowledged that detailed competitive information of the type here in issue constitutes trade secrets entitled to protection from public disclosure.

In *Abbott* v. *United States*, 239 F.2d 310, 314 (5th Cir. 1956), the Court found the geophysical surveys underlying a company's reserve estimates to be of "almost inestimable practical value in the essential program of continuous exploration and development of mineral resources which is the life blood of an oil producing company." Moreover, once disclosed, such data possesses "a 'negative' value" in the hands of a competitor who can use it to "undertake development, procure leases, and impede or thwart the company's plans." *Accord Hunter* v. *Shell Oil Co.*, 198 F.2d 485 (5th Cir. 1952); *Ohio Oil Co.* v. *Sharp*, 135 F.2d 303 (10th Cir. 1943); *Pratt* v. *Shell Petroleum Corp.*, 100 F.2d 833 (10th Cir. 1938). *See also John T. Lloyd Laboratories, Inc.* v. *Lloyd Brothers Pharmacists, Inc.*, 131 F.2d 703, 707 (6th Cir. 1942); *Dollac Corp.* v. *Margon Corp.*, 164 F.Supp. 41, 59 (D.N.J.1958), *aff'd*, 275 F.2d 202 (3d Cir. 1960); *Jerrold-Stephens Co.* v. *Gustaveson, Inc.*, 138 F.Supp, 11, 15–16 (W.D.Mo.1956); *Newell* v. *O. A. Newton & Son*, 104 F.Supp. 162, 165 (D.Del.1952). And in *Continental Oil Co.* v. *FPC*, 519 F.2d 31, 32, 35 (5th Cir. 1975), the Fifth Circuit voided an FPC order permitting public access to materials submitted by interstate natural gas companies which contained "detailed intrastate sales information, including the names of purchasers, date and location of the sale, pressure base, annual sales volume and price terms," and data with reference to "extent of supply." The Court held that such information fell squarely within the Freedom of Information Act's "trade secret" exemption from public disclosure, reasoning that disclosure "would alter industry custom and existing relationships to the disadvantage of petitioner's competitive positions." 519 F.2d at 35.

[1] After careful evaluation of the Hardin Affidavit, *supra*, with due deference to the findings of the National Geological Survey, and in consideration of the cases discussed *supra*, the Court is of the opinion that at least that portion of the data in issue detailing Ashland's natural gas reserve estimates constitutes "trade secret" information within the purview of Section 6(f) of the FTC Act.

III. THE SUBCOMMITTEE SUBPOENA

[2] While the investigatory power of Congress is not explicitly mentioned in the Constitution, the courts have long held the power to

be necessarily implied in the legislative function under Article I, as well as other portions of the Constitution.[7] *McGrain* v. *Daugherty*, 273 U.S. 135, 161, 47 S.Ct. 319, 71 L.Ed. 580 (1927); *see also Anderson* v. *Dunn*, 6 Wheat. (19 U.S.) 204, 5 L.Ed. 242 (1821); *United States* v. *Rumely*, 345 U.S. 41, 46, [305] 73 S.Ct. 543, 97 L.Ed. 770 (1953). Absent such a power, a legislative body could not "wisely or effectively" evaluate those conditions "which the legislation is intended to affect or change." *McGrain* v. *Daugherty*, *supra*, 273 U.S., at 175, 47 S.Ct. at 329.

[3,4] Although the investigatory power is "penetrating and farreaching" in scope, *Barenblatt* v. *United States*, 360 U.S. 109, 111, 79 S.Ct. 1081, 3 L.Ed.2d 1115 (1959), it is not unlimited. "Its boundaries are defined by its source." *Watkins* v. *United States*, 354 U.S. 178, 197, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957); *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, at 504, n. 15, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975). Hence, the parameters of the inquiry may be no broader than the "legitimate sphere of legislative activity." *See Eastland* v. *United States Servicemen's Fund*, *supra*, 421 U.S., at 504, 95 S.Ct. 1813; *Kilbourn* v. *Thompson*, 103 U.S. 168, 189, 26 L.Ed. 377 (1881); *McGrain* v. *Daugherty*, *supra*, 273 U.S., at 174, 47 S.Ct. 319.

[5] The standard to be applied in determining whether the Congressional investigatory power has been properly asserted in a particular case was articulated by the Supreme Court in *Wilkinson* v. *United States*, 365 U.S. 399, 408–09, 81 S.Ct. 567, 5 L.Ed.2d 633 (1961): (1) the Committee's investigation of the broad subject matter area must be authorized by Congress; (2) the investigation must be pursuant to "a valid legislative purpose";[8] and (3) the specific inquiries involved must be pertinent to the broad subject matter areas which have been authorized by the Congress.

[6,7] In evaluating these requirements, the Court must consider the relevant rules of the House, the authorizing resolution, the full committee's resolution by which the Subcommittee was authorized to proceed, and the nature and context of the legislative proceedings. *Watkins* v. *United States*, *supra*, 354 U.S., at 209–15, 77 S.Ct. 1173; *Barenblatt* v. *United States*, *supra*, 360 U.S., at 117, 79 S.Ct. 1081; *see also*, *United States* v. *Rumely*, *supra*, 345 U.S., at 51, 73 S.Ct. 543;

[7] "In actual legislative practice, power to secure needed information . . . has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the colonial Legislatures before the American Revolution, and a like view has prevailed and been carried into effect in both houses of Congress and in most state Legislatures." *McGrain* v. *Daugherty*, 273 U.S. 135, 161, 47 S.Ct. 319, 324, 71 L.Ed. 580 (1927).

[8] The types of legislative activities which have justified exercise of the power to investigate include: the primary functions of legislating and appropriating, *Barenblatt* v. *United States*, *supra*, 360 U.S., at 109, 79 S.Ct. 1081; the function of deciding whether or not legislation is appropriate, *Quinn* v. *United States*, 349 U.S. 155, 161, 75 S.Ct. 668, 99 L.Ed. 964 (1955); oversight of the administration of laws by the executive branch, *McGrain* v. *Daugherty*, *supra*, 273 U.S., at 177, 47 S.Ct. 319; *Sinclair* v. *United States*, 279 U.S. 263, 295, 49 S.Ct. 268, 73 L.Ed. 692 (1929); and the essential Congressional function of informing itself in matters of national concern, *United States* v. *Rumely*, *supra*, 345 U.S., at 43, 45, 73 S.Ct. 543; *Watkins* v. *United States*, *supra*, 354 U.S., at 200, n. 3, 77 S.Ct. 1173.

Sacher v. *United States*, 356 U.S. 576, 78 S.Ct. 842, 2 L.Ed.2d 987 (1958). And, in deciding the pertinency, the specific inquiries need only be reasonably related to the major subject matter area under investigation. *Sinclair* v. *United States*, 279 U.S. 263, 299, 49 S.Ct. 268, 73 L.Ed. 692 (1923).

Applying the foregoing legal principles to the facts of the present case, we note first, that the broad subject matter areas which the Subcommittee is investigating—national energy policy, natural gas supply and production, the need for emergency natural gas legislation and the role of federal agencies in national energy affairs—are areas committed to the Subcommittee's jurisdiction by proper Congressional authorization.

Rule X of the Rules of the House of Representatives (94th Cong.) gives the House Committee on Interstate and Foreign Commerce jurisdiction over, *inter alia*, "interstate and foreign commerce generally," "interstate oil compacts and petroleum and natural gas except on public lands," and "consumer affairs and consumer protection." House Rule X, [306] § 1(L)(1), (3) and (8). The committee has extensive oversight responsibilities including the duty to review and study on a continuing basis the "application, administration, execution, and effectiveness" of existing legislation and "any conditions or circumstances which may indicate the necessity or desirability of enacting new or additional legislation" within the jurisdiction of the committee. House Rule X, § 2(b); see also 2 U.S.C. § 190d.

Rule X also confers upon each of the standing committees of the House the power to "establish an oversight subcommittee . . . to conduct oversight in the area of their respective jurisdictions, to assist in carrying out its responsibilities. . . ." House Rule X, § 2(b)(1). Rule X of the House Committee on Interstate and Foreign Commerce (94th Cong.) establishes the Subcommittee on Oversight and Investigations, giving it jurisdiction, *inter alia*, to ". . . coordinate its work with the work of the other standing subcommittees . . ." and to "maintain regular communication with the standing subcommittees in order to obtain advice on subjects for investigation."

A resolution agreed to by the full committee on February 26, 1975, establishes the jurisdiction of the Subcommittee as follows:

> Jurisdiction: Responsibility for Oversight of agencies, departments and all programs within the jurisdiction of the full committee and to conduct such investigations within such jurisdiction.

Pursuant to the authority of these Rules and the resolution of

February 26, 1975, and in order to carry out its legislative review functions under 2 U.S.C. § 190d,[9] the Subcommittee on April 17, 1975, approved an extensive study of national energy policy, specifically including the subject of "natural gas supplies" and "curtailments of natural gas." Under the Rules of the House of Representatives and an enabling resolution of the full committee, the Subcommittee has subpoena power to compel attendance of witnesses and production of documents in furtherance of such an investigation.[10] The subpoena in this case was issued by the Subcommittee to the FTC pursuant to that enabling resolution.

Second, we note that the committee and Subcommittee are clearly engaged in "a valid legislative purpose" with respect to the present study of energy problems, natural gas supply and production, emergency natural gas legislation and the role of the Federal Trade Commission, the Federal Power Commission, and other agencies responsible for national energy policy. The broad subject matters under investigation have direct relation to pending legislation,[11] to the decision whether or not to legislate, to the function of overseeing the administration of laws by federal agencies, and to the function of informing itself generally concerning matters of national importance.[12]

And finally, we find that the Subcommittee's specific inquiries to the FTC in the instant case are pertinent to the broad subject matter areas which the House of Representatives has authorized the committee and Subcommittee to investigate. The supply and production of natural gas on federal lands has a distinct impact on the interstate market and national energy policy. The accuracy of reporting regarding natural gas [307] supplies on federal lands relates to an important question of whether natural gas producers, like Ashland, are properly reporting their reserves.

The specific inquiry directed to the FTC pertains to the need for and content of the proposed Natural Gas Emergency Act of 1975, H.R. 9446, 94th Cong., 1st Sess. (which was reported by the full committee and is currently awaiting action by the full House) and is apposite to an authorized area of investigation regarding the role of the FTC, FPC and other federal agencies with respect to supply and production of natural gas.

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[9] Section 190d requires, *inter alia*, that each standing committee of the Congress "shall review and study, on continuing basis, the application, administration, and execution of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee."

[10] The House Committee on Interstate and Foreign Commerce agreed to a resolution on April 17, 1975, which gave the Subcommittee authority to require by subpoena the attendance of witnesses and production of documents. *Cf.* House Rule XI, § 2(m)(94th Cong.)

[11] *See, e.g.*, H.R. 9464, 94th Cong., 1st Sess.

[12] *See generally*, Hearings on Natural Gas Supplies Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Cong., 1st Sess. (1975)(two volumes).

Moreover, the legitimacy of the specific inquiry to the FTC here has been ratified by the full House which authorized Chairman Moss to intervene in this action to secure the subpoenaed information "now in the possession of the Federal Trade Commission for the use of the committee and the House" H.Res.No.899, § 1, 121 Cong.Rec. 12, 918-19 (daily ed. December 18, 1975).

[8-10] In summary, we find that the particular investigation here in issue is directly related to and in furtherance of "a legitimate task of Congress." *Watkins* v. *United States, supra,* 354 U.S., at 187, 77 S.Ct. 1173. The Subcommittee, in issuing the subpoena, was acting under the clear mandate of the full committee and the House of Representatives to investigate within the "sphere of legitimate legislative activity" and that grant of authority is itself sufficient to show that the investigation upon which the Subcommittee has embarked "concerned a subject on which 'legislation could be had.' " *Eastland* v. *United States Servicemen's Fund, supra,* 421 U.S., at 506, 95 S.Ct. at 1823; *McGrain* v. *Daugherty,* 273 U.S., at 177, 47 S.Ct, 319; *see also Communist Party* v. *Control Board,* 367 U.S. 1, 81 S.Ct. 1357, 6 L.Ed.2d 625 (1961).

IV. PLAINTIFF'S MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION

The factors to be considered by a court in its determination of whether to grant injunctive relief were articulated by the Court of Appeals for the District of Columbia, per Burger, J., in *Virginia Petroleum Jobbers Association* v. *Federal Power Commission,* 104 U.S.App.D.C. 106, 259, F.2d 921, 925 (1958). The Court stated:

> Essentially, four factors influence our decision: (1) Has the petitioner made a strong showing that [he] is likely to prevail on the merits? • • • (2) Has the petitioner shown that without such relief, it will be irreparably injured? • • • (3) Would the issuance of a stay substantially harm other parties interested in the proceeding? • • • (4) Where lies the public interest?

Since the Court believes the second element of this test to be dispositive of the present action, we focus our attention on the requirement that the plaintiff demonstrate irreparable injury in the absence of an injunction.

[11-14] Injunctive relief is appropriate only "to prevent existing or presently threatened injuries" and "will not be granted against something merely feared as liable to occur at some indefinite time in the future." *Connecticut* v. *Massachusetts,* 282 U.S. 660, 674, 51 S.Ct. 286, 291, 75 L.Ed. 602 (1930). *See also, General Fireproofing Company* v. *Wyman,* 444 F.2d 391, 393 (2d Cir. 1971). Injunctions will not be granted where the injuries complained of are prospective and "which may, indeed, never occur." *Crimmins* v. *American Stock Exchange,*

Inc., 346 F.Supp. 1256, 1262 (S.D.N.Y. 1972). The injury complained of must be of such *imminence* that there is a "clear and present" need for equitable relief to prevent irreparable harm. *Hershey Creamery Co.* v. *Hershey Chocolate Corp.*, 269 F.Supp. 45 (S.D.N.Y.1967); *see also Assn. of Professional Engineering Personnel* v. *Radio Corp. of America*, 183 F.Supp. 834 (D.C.N.J.1960). And the required showing of irreparable injury is not eliminated simply by virtue of a claim alleging violation of statutory or constitutional rights (unless the requirement has been specifically eliminated by statute). Thus, in *United Fuel Gas Co.* [308] v. *Railroad Commission*, 278 U.S. 300, 49 S.Ct. 150, 73 L.Ed. 390 (1928), the Supreme Court noted:

> Suitors may not resort to a court of equity to restrain a threatened act merely because it is illegal or transcends constitutional powers. They must show that the act complained of will inflict upon them some irreparable injury. 278 U.S., at 310, 49 S.Ct., at 152 (Stone, J.)

See also Newtex S. S. Corp. v. *United States*, 107 F.Supp. 388 (S.D.N.Y.1952), *aff'd*, 344 U.S. 901, 73 S.Ct. 285, 97 L.Ed. 696; *Ellis Raw Bar* v. *District of Columbia Redevelopment Land Agency*, 139 U.S. App.D.C. 385, 433 F.2d 543 (1970).

[15] While Ashland couches its concerns in terms of "public disclosure," any irreparable injury to it would result, more precisely, in disclosure to its competitors. Certainly, such injury might logically result as well from general dissemination. But the transfer of such data from the FTC to the Subcommittee and the Subcommittee's review of that information, does not lead inexorably to either public dissemination or disclosure to Ashland's competitors. Moreover, the courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties. *See, Ansara* v. *Eastland*, 143 U.S.App.D.C. 29, 442 F.2d 751, 754 (1971); *United States* v. *Tobin*, 195 F.Supp. 588, 613 (D.D.C. 1961).[13]

Ashland argues that this presumption is rebutted by "Congressman Moss's own past practices" and the Subcommittee's handling of trade secrets in the past which, according to plaintiff, "has shown either a total incapacity to protect such trade secrets or a callous indifference to the proprietary nature of those secrets."[14] (Plantiff's Reply

[13] "This court cannot assume, as plaintiffs urge, that the members of the committee will fail to give consideration to constitutional claims they consider may have merit. On the contrary, we may rightly assume that the legislators are sensitive to, and will endeavor to act conformably to, the principle that the Bill of Rights applies to the legislature's investigations as well as to its enactments." *Ansara* v. *Eastland*, 143 U.S.App.D.C. 29, 442 F.2d 751, 753-54 (1971).

[14] Ashland cites several instances in the past in which it appears that either Chairman Moss or his Subcommittee has failed to accord confidentiality to admittedly sensitive trade materials, *viz.*:

(a) On a prior occasion, involving natural gas reserve estimates submitted to the FTC "subject to an agreement restricting access to and disclosure of the data," Congressman Moss released such proprietary information to the general public. Cf., *Federal Trade Commission* v. *Texaco, Inc.*, 517 F.2d 137, 141, n. 4, 151, n. 37 (D.C. Cir. 1975).

(b) In the Subcommittee's 1975 report on "Natural Gas Supply" hearings, proved reserve estimates which had been entered in the logs of Gulf Oil Corporation's estimates for West Delta 27 Field were disclosed in detail at p. 610. Additional natural gas reserve estimates were published at p. 98–102, 177–214, 610, 636–37, 643, 655 and 657. *See* Hearings Before the House Subcommittee on Interstate and Foreign Commerce, "Natural Gas Supplies," 94th Cong.,

(Continued)

Memorandum, p. 59). In addition, Ashland suggests that the Court take judicial notice of the fact that throughout the pendency of this action, "there has been no promise or commitment that Ashland's trade secret data would be given confidential treatment." *Id.*, at 58. While the Court can appreciate Ashland's concern under these circumstances, it does not appear to the Court that isolated instances of breached confidentiality in the past are sufficient to overcome the continuing presumption of Congressional propriety.

Through its staff counsel, the Subcommitte has indicated that there is "no [309] indication" that the Subcommittee "would release information originating from Ashland." (Affidavit of Michael R. Lemov, Intervenor's Motion to Dismiss). And Chairman Moss, through counsel, has represented:

> Of course, the Subcommittee does not seek publication of Ashland's trade secrets; it seeks merely production of documents in compliance with a Congressional subpoena. (Response of Chairman Moss to Ashland's Opposition to Motion to Dismiss, p. 6).

[16] Weighing all of these considerations, it appears to the Court, on balance, that the irreparable injury which Ashland seeks this Court to prevent by the issuance of permanent injunctive relief is neither "presently threatened" nor "imminent." The injuries complained of are, rather, "prospective" in nature and "may, indeed, never occur." *See Crimmins* v. *American Stock Exchange, supra.*

V. CONCLUSION

If irreparable injury cannot be established, and we hold that it has not been established in this case, injunctive relief is not warranted. It follows that the Court need not consider the other factors outlined in *Virginia Petroleum Jobbers Association, supra,* nor need we reach the merits of Ashland's complaint, nor dispose of the arguments and counter arguments propounded by the parties in support of their respective positions.

The foregoing constitutes the Court's findings of fact and conclusions of law, pursuant to Fed.R.Civ.P. 52(a).

VI. ORDER

It is, accordingly, by the Court this 2nd day of February, 1976,

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1st Sess. (1975).

(c) In an arguably analogous situation in which the Chairman sought information detailing the participation of American companies and individuals in the so-called "Arab boycott" of Israel (which materials had been submitted to then Commerce Secretary Rogers C. B. Morton under an executive pledge of confidentiality), Congressman Moss was publicly reported as having stated that a Congressional commitment to respect the confidentiality of such data "would raise serious issues of congressional responsibility" by placing "unconstitutional limits on the authority of Congress." The Washington Post, November 27, 1975, p. D9 (Plaintiff's Exhibit C).

Ordered, That plaintiff's motion for preliminary and permanent injunction should be, and the same is hereby, denied. And it is further

Ordered, That defendants' motion to dismiss should be, and the same is hereby, granted. And it is further

Ordered, That the temporary restraining order entered in this action should be, and the same is hereby, dissolved. And it is further

Ordered, That the effect of this order should be, and the same is hereby, stayed until the expiration of ten (10) days from the entry thereof, pursuant to Fed. R.Civ.P. 62(a).

FEDERAL TRADE COMMISSION v. TEXACO, INC. AND CONSOLIDATED CASES*

Civ. A. No. 1089–73, No. 74–1547 et al.

(United States Court of Appeals, District of Columbia Circuit, February 6, 1976)

On petition for rehearing, court vacated a decision regarding F.T.C. subpoenas to secure natural gas data from oil companies rendered August 8, 1975, 517 F.2d 137 (D.C. Cir. 1975).

Before BAZELON, *Chief Judge;* WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges.*

ORDER

PER CURIAM: On consideration of appellant's petition for rehearing and suggestion for rehearing *en banc*, it is

Ordered by the Court *en banc* that appellant's aforesaid suggestion for rehearing *en banc* is granted, and it is

Further Ordered by the Court *en banc, sua sponte,* that the opinion and judgment filed herein on August 8, 1975 are hereby vacated.

Circuit Judges MCGOWAN, TAMM and ROBB did not participate in the foregoing order.

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶60,713 at 68,066 (1976–1 Trade Cases).

A.O. SMITH CORPORATION et al. v. FEDERAL TRADE COMMISSION et al.*

INLAND STEEL COMPANY v. FEDERAL TRADE COMMISSION et al.*

NORTHWEST INDUSTRIES, INC. v. FEDERAL TRADE COMMISSION et al.*

OSCAR MAYER & CO. INC. v. FEDERAL TRADE COMMISSION et al.*

MERCK & CO., INC. v. FEDERAL TRADE COMMISSION et al.*

HOBART CORPORATION v. FEDERAL TRADE COMMISSION et al.*

THE GOODYEAR TIRE & RUBBER COMPANY v. FEDERAL TRADE COMMISSION et al.*

THOMAS J. LIPTON, INC. v. FEDERAL TRADE COMMISSION et al.*

(Nos. 75–1282 — 75–1289. F.T.C. File No. 99–199.

(United States Court of Appeals, Third Circuit, February 11, 1976)

1. WHERE RELIEF IS NOT PROHIBITED BY STATUTE OR ACTION IS NOT COMMITTED TO AGENCY DISCRETION BY LAW, AGGRIEVED PARTY MAY APPLY TO FEDERAL COURT FOR JUDICIAL REVIEW.

   [516] A person aggrieved by final agency action may come to federal court for judicial review so long as (a) no statute precludes such relief or (b) action is not one committed by law to agency discretion.

2. FACT THAT FTC HAD NOT YET ISSUED NOTICES OF DEFAULT DID NOT PRECLUDE DISTRICT COURT FROM CONSIDERING PREENFORCEMENT SUITS FOR DECLARATORY AND INJUNCTIVE RELIEF.

   District court was not precluded from entertaining preenforcement suits by corporations for declaratory and injunctive relief against Federal Trade Commission by mere reason of fact that Commission had not as yet issued notices of default to corporations for failure to file annual line of business reports.

3. UNLESS ISSUES ARE FIT FOR JUDICIAL RESOLUTION AND WITHHOLDING RESOLUTION WOULD RESULT IN HARDSHIP TO PARTIES, COURT SHOULD HESITATE TO APPLY INJUNCTIVE AND DECLARATORY RELIEF.

   Where party aggrieved seeks discretionary relief such as injunctive and declaratory relief, court should hesitate to apply such remedies unless (a) issues are

* Reported in 530 F.2d 515 (1976). For case before the District Court of Delaware, see 396 F.Supp. 1108, 1125; 9 S. & D. 1205, 1293.

fit for judicial resolution and (b) withholding judicial consideration would result in hardship to parties.

4. PREVENTION OF COURT ENTANGLEMENT IN ABSTRACT DISPUTES AND PROTECTION OF AGENCIES FROM PREMATURE INTERFERENCE IS UNDERLYING RATIONALE OF RIPENESS DOCTRINE.

Underlying rationale of ripeness doctrine is to prevent courts from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until an administrative decision has been formalized.

5. DESPITE FACT THAT NOTICES OF DEFAULT HAD NOT ISSUED, ORDERS WERE FINAL AND FIT FOR JUDICIAL REVIEW WHERE ORDERS SPECIFICALLY WARNED OF CIVIL FINES AND FTC CONVEYED IMPRESSION THAT FULL AND PROMPT COMPLIANCE WAS EXPECTED.

Orders of Federal Trade Commission requiring corporations to file annual line of business reports were final and fit for judicial review, notwithstanding that Commission had not as yet issued notices of default to corporations for failure to file reports, where orders warned specifically of applicable civil fines for failure to file or for filing a false report, initial, renewed and amended motions to quash had been denied, and impression was steadfast conveyed by Commission that it desired full and prompt compliance with orders.

6. IMPACT ON COMPLAINANT MUST BE SUFFICIENTLY ADEQUATE AND IMMEDIATE IN MEASURING RIPENESS FROM STANDPOINT OF WHETHER WITHHOLDING JUDICIAL REVIEW WOULD RESULT IN HARDSHIP TO PARTIES.

In measuring ripeness from standpoint of whether withholding judicial review would result in hardship to parties, impact on complaining parties must be sufficiently direct and immediate.

7. WHERE AGENCY ACTION IS CLEAR-CUT AND FINAL, AND PUTS AGGRIEVED PARTY ON HORNS OF A DILEMMA, IT IS RIPE FOR JUDICIAL REVIEW.

One seeking discretionary relief may not obtain preenforcement judicial review of agency action if there is no immediate threat of sanction for noncompliance, or if potential sanction is de minimis; conversely, court should find [517] agency action ripe for judicial review if action is final and clear-cut, and if it puts complaining party on horns of a dilemma.

8. WHERE COMPLIANCE WITH FTC ORDERS WOULD HAVE RESULTED IN LOSS OF PROFITS AND NONCOMPLIANCE COULD RESULT IN CIVIL PENALTIES, IMPACT WAS SUFFICIENTLY DIRECT AND IMMEDIATE TO WARRANT JUDICIAL REVIEW UNDER RIPENESS DOCTRINE.

Impact of orders of Federal Trade Commission requiring corporations to file annual line of business reports was sufficiently direct and immediate as to preclude withholding of judicial review under ripeness doctrine where corporations were placed in a real quandry inasmuch as they would have to commit substantial resources to develop accounting techniques necessary for compliance and, as a result, suffer loss of profits if they chose to comply with orders and, in event they chose not to comply, they would have to wait for enforcement and risk civil fines for noncompliance.

9. TRIAL COURT, NOT APPELLATE, HAS DISCRETION TO GRANT OR DISSOLVE INJUNCTIONS.

The power to grant or dissolve an injunction has been entrusted to discretion of the trial court in first instance, and not to the appellate court.

10. APPELLATE COURT MUST PRESUME THAT TRIAL COURT'S JUDGMENT WAS CORRECT, UNLESS IT ABUSED ITS POWER OR MADE A SERIOUS MISTAKE IN APPLYING LAW OR CONSIDERING PROOF.

Unless the trial court abuses its power to grant or dissolve an injunction, commits an obvious error in applying the law, makes a serious mistake in considering the proof, the appellate court must take the judgment of the trial court as presumptively correct.

11. ABBREVIATED SET OF FACTS REQUIRING FINE BALANCING OF EVENTUAL SUCCESS WITH CONSEQUENCES OF IMMEDIATE IRREPARABLE INJURY IS ALMOST ALWAYS BASIS FOR DENYING OR GRANTING INJUNCTIVE RELIEF.

The grant or denial of request for an injunction is almost always based on an abbreviated set of facts, requiring delicate balancing of the probabilities of ultimate success at final hearing, with the consequences of immediate irreparable harm which could possibly flow from the denial of preliminary relief.

12. QUESTIONS OF STRONG SHOWING OF PREVAILING ON MERITS, IRREPARABLE HARM, HARM TO INTERESTED PARTIES, AND PUBLIC INTEREST MUST BE ASKED BY APPELLATE COURT IN EXERCISING LIMITED REVIEW OF INJUNCTIVE RELIEF.

In exercising its limited review of the grant or denial of preliminary injunctive relief, the appellate court asks: (a) Did the movant make a strong showing that it is likely to prevail on the merits? (b) Did the movant show that, without such relief, it would be irreparably injured? (c) Would the grant of a preliminary injunction substantially have harmed other parties interested in the proceedings? And (d) where lies the public interest?

13. BURDEN OF PROOF RESTS WITH APPLICANT FOR A PRELIMINARY INJUNCTION.

The applicant for a preliminary injunction bears the burden of establishing a right to such injunctive relief and that irreparable injury will result to him if it is not granted.

14. EXCEPT UPON SHOWING OF IRREPARABLE HARM, A PRELIMINARY INJUNCTION WOULD NOT ISSUE.

A preliminary injunction will not issue except upon a showing of irreparable injury.

15. IN CONTEXT OF PRELIMINARY INJUNCTION, IRREPARABLE HARM IS A CONCEPT RELATED TO, BUT NOT EQUIVALENT TO THE HARDSHIP OF PARTIES INGREDIENT.

Irreparable harm as a concept to be considered in the context of a preliminary injunction, is related to, but not the equivalent of, the hardship to the parties ingredient of the ripeness test.

16. IN CONTEXT OF PRELIMINARY INJUNCTION, "IRREPARABLE HARM" MEANS THAT WHICH CANNOT BE REPAIRED, RETRIEVED, PUT DOWN AGAIN, OR ATONED FOR.

"Irreparable harm," in relation to a preliminary injunction, means that which cannot be repaired, retrieved, put down again, atoned for.

17. WHERE POTENTIAL CIVIL SANCTIONS WERE MINIMAL; VARIATION BETWEEN SCOPE OF DISCOVERY AND THAT AVAILABLE IN DEFENDING AN

ENFORCEMENT ACTION WAS DE MINIMIS AND EVIDENCE OF IRREPARABLE INJURY WAS LACKING, CORPORATIONS WERE NOT ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF.

Corporations were not entitled to preliminary injunctive relief in preenforcement suits against Federal Trade Commission, notwithstanding costs and commitment of diverse business resources incident to preparation in compliance with orders of Commission requiring filing of annual line of business reports, where evidence of irreparable injury was lacking in that variation between scope of discovery available to corporations in action and scope of discovery that would be available to them in defending a later enforcement action was slight, costs were mere business expenses in event authority of Commission noncompliance were de minimis, and corporations failed to prove that they would be subject to criminal sanctions in absence of an injunction.

(Syllabus, with substituted captions, taken from 530 F.2d 515)

On appeal, Court held that mere fact that notices of default had not been issued did not preclude judicial review; that Commission orders were final, and thus, fit for judicial review; and that impact was adequately direct and immediate for purpose of ripeness; but where corporation failed to prove their allegation of irreparable harm, to issue preliminary injunctive relief was error.

Order denying motion to dismiss complaint affirmed; order granting preliminary injunctive relief vacated.

ADAMS, *Circuit Judge*, concurred in part and dissented in part and filed opinion.

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Before ALDISERT, KALODNER and ADAMS, *Circuit Judges.*

OPINION OF THE COURT

[518] We are to decide whether the district court had jurisdiction to entertain pre-enforcement suits for declaratory and injunctive relief against the Federal Trade Commission[1] and, if so, whether the court erred in refusing to dismiss the complaint or in granting a preliminary injunction. After hearing, the district court preliminary enjoined the Commission from giving notice of default to appellees for failure to file Annual Line of Business Reports and from enforcing civil penalties for appellees' failure to file the reports. *A. O. Smith Corp.* v. *FTC,* 396 F.Supp. 1108 (D.Del.1975)(*"A. O. Smith I"*); *A. O. Smith Corp.* v. *FTC,* 396 F.Supp. 1125 (D.Del.1975)(*"A. O. Smith II"*). This appeal followed. We conclude that the district court had jurisdiction, but that it erred in granting preliminary injunctive relief.

Prompted by what it considered the inadequacies of existing corporate financial reporting, the Bureau of Economics recommended in 1970 that the Commission exercise its authority to require meaningful public reporting of financial information on a divisional basis as an extension of the existing Quarterly Financial Reports program. In March of 1974, the Commission submitted its proposed Line of Business (LB) Reports Form to the Comptroller General pursuant to 44 U.S.C. § 3512. The forms require, *inter alia,* detailed sales and cost data broken down into line of business categories as defined by the Commission. Finding specifically that the "information sought in the FTC LB proposal is not presently available from another source within the Federal government," the Acting Comptroller General approved the LB form, with certain provisions not here relevant, on May 13, 1974.

On August 2, 1974, the FTC adopted a resolution putting the program into effect. This resolution, which later appeared in the Federal Register, stated in part that "continuing and current financial data and statistics from corporations within the various industries and lines of commerce of the United States" were "necessary for the proper functioning of the government". 39 Fed.Reg. 30377 (1974). Pursuant to the resolution, the Commission ordered 345 of the nation's largest companies to complete and file LB reports. The orders required that [519] reports be filed within 150 days of receipt of the orders

[1] The individual Commissioners and the Comptroller General of the United States were also named as defendants in the district court. The injunction ran against the FTC and the individual Commissioners. No preliminary relief was sought against the Comptroller General. Accordingly, when we use the term "Commission" in the context of this appeal, we refer to the collective interests of all appellants.

which were served during August 1974. The orders concluded: "You are advised that penalties may be imposed under applicable provisions of Federal law for failure to file this report or for the filing of a false report." App. at 328. About 250 of the companies filed timely motions to quash the LB orders; these motions were denied. Renewed and amended motions to quash followed. On January 7, 1975, the FTC denied all motions to quash. *Ibid.* at 99–106.

Seven corporations, the appellees at No. 75–1282, filed suit in the district court on January 22, 1975, seeking pre-enforcement declaratory and injunctive relief. They alleged, *inter alia*, lack of statutory authority to issue the LB orders, undue burden on the companies to comply with the orders, and failure of the Commission to promulgate the orders in accordance with the procedures for rule making prescribed by the Administrative Procedure Act. They also asserted various constitutional grounds. Six other companies, appellees at Nos. 75–1283/8, filed similar actions on February 14, 1975. Appellee at No. 75–1289 filed its action on February 24, 1975, seeking virtually the same relief. The Commission moved to dismiss the complaints; the companies moved for preliminary injunctions against enforcement of the LB orders. The district court denied the Commission's motion, and granted the corporations' motions, entering preliminary injunctions on February 19 *(A. O. Smith I)* and March 18, 1975 *(A. O. Smith II)*. The Commission's appeals from both orders have been consolidated before us.

On appeal, the Commission advances alternative theories for reversal. First, it argues that the district court did not have jurisdiction to entertain this pre-enforcement suit, because the FTC Act provides for counter-enforcement procedures which afford a party challenging an FTC order with an adequate remedy. See 15 U.S.C. § 49. Next, the Commission contends that, if the district court had jurisdiction, it should have declined to exercise that jurisdiction, because the controversy was not yet ripe for judicial resolution. Finally, the Commission urges that the district court erred in preliminarily enjoining the Commission from giving notice of default and from enforcing penalties for failure to file. Here, the FTC particularly controverts the district court's conclusion that appellees established a probability of succeeding with the merits of their rule-making claims; the Commission contends that its LB orders were issued pursuant to Section 6 of the FTC Act, 15 U.S.C. § 46, and were not subject to the rule-making provisions of the Administrative Procedure Act, 5 U.S.C. § 553. The Commission also challenges the issuance of the preliminary injunction on the ground that appellees failed to prove they would be irreparably harmed absent the injunction.

We conclude that the district court had jurisdiction; that it properly

exercised that jurisdiction because the controversy was ripe for judicial resolution; but that it erred in issuing the preliminary injunction because appellees failed to establish irreparable harm. Accordingly, we neither reach, nor express an opinion on, the question whether appellees demonstrated a probability of succeeding on the merits of their claim that the APA's rule-making provisions applied to the issuance of the LB orders.

I.

Appellants' initial argument is that the district court had no jurisdiction to entertain pre-enforcement complaints challenging the LB orders. At the outset, we note that the district court held that it had federal question jurisdiction under 28 U.S.C. § 1331, or, alternatively, jurisdiction under 28 U.S.C. § 1337. *A. O. Smith I, supra,* 396 F.Supp. at 1113; *see* Tr. Oral Arg. at 44–45. Appellants do not contest these rulings. In any event, we would agree with the district court. Thus, this case is distinguishable from *West Penn Power Co.* v. *Train,* 522 F.2d 302 (3d Cir. 1975), *petition for cert. filed,* 44 U.S.L.W. 3417 (U.S. Jan. 9, 1976) (No. 75–974), the primary holding of which was that the district court had [520] not erred in dismissing the complaint because there was no independent jurisdictional predicate. *Compare ibid.* at 308 n. 26 & 309–10 (majority opinion) *with ibid.* at 321 n. 42 (Adams, J., dissenting).

Instead, appellants' first contention proceeds from recognition that the LB orders were issued pursuant to Section 6(b) of the FTC Act, 15 U.S.C. § 46(b), and, as such, were not self-enforcing. Rather, the legislative scheme calls for the Commission to enforce the LB orders by using the procedures set forth in Sections 9 and 10 of the Act, 15 U.S.C. §§ 49, 50. Under Section 9 the Commission may petition the court for an order in the nature of mandamus to compel the filing of a report; Section 10 provides for the issuance of notices of default, and for the accrual of civil penalties of $100 a day for each day of default after the thirtieth day following receipt of the notice. Accordingly, appellants argue that, until the FTC seeks to enforce it orders, the district courts are without jurisdiction to entertain actions for declaratory and injunctive relief.

In this argument, appellants rely on *FTC* v. *Claire Furnace Co.,* 274 U.S. 160, 47 S.Ct. 553, 71 L.Ed. 978 (1927), as modified by the holding in *St. Regis Paper Co.* v. *United States,* 368 U.S. 208, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961). These cases, appellants contend, stand for the proposition that, unless a notice of default has issued, there can be no judicial review of an FTC order issued pursuant to Section 6(b) until

the Commission moves for enforcement under Section 9. *See, e.g., Genuine Parts Co.* v. *FTC*, 445 F.2d 1382 (5th Cir. 1971).[2] Since the Commission had not moved effectively for enforcement of the LB orders against any of the instant appellees, *see A. O. Smith I, supra*, 396 F.Supp. at 1112; *A. O. Smith II, supra*, 396 F.Supp. at 1129, appellants urge that the district court had no jurisdiction to hear the cases.

The appellees' response is that the *Claire Furnace-St. Regis* formula no longer controls. They point out that *Claire Furnace* antedated the Declaratory Judgment Act by some seven years and the Administrative Procedure Act by some 19 years. *See Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 142 and nn. 4–6, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Most important, contend appellees, the paramount principles today in deciding whether federal courts have jurisdiction to review administrative actions derive from the Supreme Court's 1967 *Abbotts Laboratories* trilogy,[3] recently reaffirmed in *Dunlop* v. *Bachowski*, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975). The district court agreed with appellees. So do we.[4] Accordingly, we turn to an analysis of the legal precepts Justice **[521]** Harlan articulated in *Abbott Laboratories* and their application to the facts at hand.

[1,2] The fundamental jural lesson flowing from *Abbott Laboratories* is this: a person aggrieved by final agency action may come to federal court for judicial review "so long as [*a*] no statute precludes such relief or [*b*] the action is not one committed by law to agency discretion." 387 U.S. at 140, 87 S.Ct. at 1511. Appellants do not claim applicability of either exception; nor do we find one obtained. As the Supreme Court said in *Abbott Laboratories*, and reiterated last term in *Dunlop* v. *Bachowski*,[5] "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial

[2] Supporting its thesis that actions may not be maintained against the Commission prior to the issuance of notices of default, appellants find analogies in cases implicating attempts to enjoin the enforcement of summons issued by the Internal Revenue Service, *Donaldson* v. *United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971); *Reisman* v. *Caplin*, 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964), or of subpoenas issued by grand juries. *In re Grand Jury Proceedings (Schofield)*, 486 F.2d 85 (3d Cir. 1973). We agree with appellees that enforcement of administrative summons, or grand jury subpoena, cases do not reach the fundamental questions raised in this appeal.

[3] *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681; *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697; *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704. Professor Davis calls *Abbott Laboratories* "the overshadowing case". K. Davis, Administrative Law Text § 21.04, at 404 (1972).

[4] As we must be cognizant of the present vitality of many rules enunciated by old and venerable cases, we must also be alert to Roscoe Pound's observation: "Now, the fact is, as far as rules are concerned, the life of a rule of law in the strict sense is relatively short. I had occasion in 1924, at the request of committee of the American Bar Association, to investigate the reports beginning in 1774, at intervals of fifty years, down to 1924, and the thing that struck me as I went on with that, and could be shown conclusively as I had finished it, was that the general run of rules of law * * * had a life of simply one generation. Fifty years is a long life for a rule, that is, a legal precept that attaches a definite detailed legal consequence to a definite detailed state of facts. And it is with rules, very largely, that this doctrine of *stare decisis* has its immediate application." Pound, *Survey of the Conference [on the Status of the Rule of Judicial Precedent] Problems*, 14 U.Cin.L.Rev. 324, 329 (1940). *See also* Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 Tul.L.Rev. 475, 482–86 (1933).

[5] The reiteration of this principle in *Dunlop* deflates any force that might otherwise have attached to appellants' argument that *Abbott Laboratories* applied only to FDA orders.

review." *Ibid.* 387 U.S. at 141, 87 S.Ct. at 1511, repeated in *Dunlop* v. *Bachowski, supra,* 421 U.S. at 567, 95 S.Ct. 1851; *see, e.g., Pollard* v. *Romney,* 512 F.2d 295, 298 (3d Cir. 1975).[6] We have examined the FTC Act and find no clear and convincing evidence of a congressional intent to bar judicial review of final FTC orders under Section 6(b). For this reason, appellants' reliance on *Getty Oil Co. (Eastern Operations), Inc.* v. *Ruckelshaus,* 467 F.2d 349 (3d Cir. 1972), *cert. denied,* 409 U.S. 1125, 93 S.Ct. 937, 35 L.Ed.2d 256 (1973), is misplaced. There, we held that Section 307 of the Clean Air Act demonstrated a clear congressional intent to limit judicial review of the Environmental Protection Administrator's actions to the courts of appeals. Accordingly, we concluded that the district court was without jurisdiction to entertain a suit seeking to enjoin enforcement of an EPA compliance order: Getty had sought judicial review in the wrong court. See *ibid.* at 356, 357–58 n. 14.

II.

[3] A second teaching of *Abbott Laboratories* is that, where the party aggrieved seeks injunctive and declaratory relief as here, since those remedies are discretionary, the court should hesitate to apply them unless (a) the issues are fit for judicial resolution and (b) withholding judicial consideration would result in hardship to the parties. *Abbott Laboratories, supra,* 387 U.S. at 149, 87 S.Ct. 1507. As Judge McGowan recently observed, this law of "ripeness", once a tangled web of special rules and distinctions, is since *Abbott Laboratories* "very much a matter of practical common sense." *Continental Air Lines, Inc.* v. *CAB,* 173 U.S.App.D.C. 1, 18, 522 F.2d 107, 124 (1975).

A.

[4] In assessing the fitness of the challenge to FDA actions for judicial decision, Justice Harlan looked to two factors: (1) the nature of the issues, which he denominated "purely legal", *Abbott Laboratories, supra,* 387 U.S. at 149, 87 S.Ct. 1507, and (2) the finality of the agency actions. These guidelines are consonant with the underlying rationale for the ripeness doctrine—"to prevent the courts * * * from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized * * *." *Ibid.* at 148, 87 S.Ct. at 1515. *See also Weinberger* v. *Salfi,* 422 U.S. 749, 765, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975).

Here, the ultimate issues raised by appellees' challenges to the LB

[6] The Court thus extended the presumption of reviewability, "disregard[ing] the fact that judicial scrutiny eventually would have been available in enforcement proceedings." *The Supreme Court, 1966 Term,* 81 Harv.L.Rev. 110, 227 (1967).

orders are purely legal: whether the promulgation of the LB resolution exceeded the Commission's authority or was in the nature of an administrative rule so as to require prior compliance with rule-making procedures specified in the APA. Further factual development would not sharpen the issues; nor does judicial considera[522]tion at this stage in any way usurp the Commission's fact-finding prerogatives.

[5] The FTC's action requiring LB reports was also final. The LB orders issued to the individual companies, including all appellees, warned specifically of applicable civil fines for failure to file or for filing a false report. *See* page 10, *supra*. Before appellees filed their complaints, the Commission had denied initial, renewed and amended motions to quash. During the course of this litigation there has not been a hint that the FTC intended to compromise the orders; rather, appellants have steadfastly conveyed the impression that they desire full and prompt compliance with the LB program. Thus, viewing the matter pragmatically, we have no hesitancy in concluding that the LB orders were final and, therefore, fit for judicial review.

B.

[6] In measuring ripeness from the standpoint of whether withholding judicial review would result in hardship to the parties, the Supreme Court requires that the impact on the complaining party be "sufficiently direct and immediate."[7] *Abbott Laboratories, supra*, 387 U.S. at 152, 87 S.Ct. 1507. As the Court elaborated:

> Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance * * *.

Ibid. at 153, 87 S.Ct. at 1518. *See generally*, K. Davis, Administrative Law Text § 21.04, especially at 404–06 (1972).

One reason for scrutiny of the "hardship to the parties" aspect of the ripeness formula is that the factual complex—but not necessarily all of it—relevant to hardship will also be relevant to the question of "irreparable injury" which must be satisfied, should it be reached, before an injunction may issue. We perceive the two concepts—"hardship to the parties" and "irreparable injury"—to be jurisprudential cousins, not identical twins. The same analytical factors may or may not support each concept; the context in which the factors are

[7] That a challenge to administrative action will not be fit for judicial review unless there is an impact on the challenger derives in part from the Article III requisite for a live case or controversy. *See generally Warth* v. *Seldin*, 422 U.S. 490, especially at 498–502 and n. 10, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Thus, in actuality, there can be no bright line of demarcation between constitutional requirements and the equitable and discretionary standards Justice Harlan discussed in *Abbott Laboratories*. Suffice it to say that ours is not a constitutional analysis.

utilized is critical. Thus, certain factors will dominate in considering hardship to the parties, while different factors may be critical in considering irreparable injury for purposes of issuing a preliminary injunction; still other factors may come into play when irreparable harm is considered in the context of a request for a permanent injunction.

Another reason for careful analysis in this area is that not every impact will be sufficiently direct and immediate. This much is clear from the *Abbott Laboratories* trilogy. There, the Court differentiated among the factual complexes presented to it. At issue in *Abbott Laboratories* was an FDA order "requiring labels, advertisements, and other printed matter relating to prescription drugs to designate the established name of the particular drug involved every time its trade name is used anywhere in such material." 387 U.S. at 139, 87 S.Ct. at 1510. The Court found the impacts sufficiently direct and immediate:

> These regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate. As the District Court found on [523] the basis of uncontested allegations, "Either they must comply with the every time requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution." 228 F.Supp. 855, 861. The regulations are clear-cut, and were made effective immediately upon publication; as noted earlier the agency's counsel represented to the District Court that immediate compliance with their terms was expected. If petitioners wish to comply they must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies. The alternative to compliance—continued use of material which they believe in good faith meets the statutory requirements, but which clearly does not meet the regulation of the Commissioner—may be even more costly. That course would risk serious criminal and civil penalties for the unlawful distribution of "misbranded" drugs.
>
> It is relevant at this juncture to recognize that petitioners deal in a sensitive industry, in which public confidence in their drug products is especially important. To require them to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily.

Ibid. at 152–53, 87 S.Ct. at 1517–1518 (footnotes omitted). In *Gardner* v. *Toilet Goods Ass'n*, *supra*, the challenge was to FDA regulations regarding color additives and hair dyes. The Color Additive Amendments of 1960 had allowed the FDA to prescribe conditions for the use of color additives, requiring clearance and certification of each "batch" of each additive. 21 U.S.C. §§ 321(t), 376. Two of the challenged regulations included as color additives substances alleged to fall outside the statutory definition. 21 C.F.R. § 8.1(m)(1967)(diluents); 21 C.F.R. § 8.1(f)(1967)("Lipstick, rouge, eye makeup colors, and related cosmetics intended for coloring the human body"). A statutory exemption for hair dyes bearing a designated cautionary label, 21

U.S.C. § 361(a), (e), was alleged to be undercut by a third regulation, 21 C.F.R. § 8.1(u)(1967). Again, the Court found sufficiently direct and immediate impacts:

> Faced with these regulations the respondents are placed in a quandary. On the one hand they can, as the Government suggests, refuse to comply, continue to distribute products that they believe do not fall within the purview of the Act, and test the regulations by defending against government criminal, seizure, or injunctive suits against them. We agree with the respondents that this proposed avenue of review is beset with penalties and other impediments rendering it inadequate as a satisfactory alternative to the present declaratory judgment action.
>
> * * * * * * *
>
> [I]f respondents, failing judicial review at this stage, elect to comply with the regulations and await ultimate judicial determination of the validity of them in subsequent litigation, the amount of preliminary paper work, scientific testing, and recordkeeping will be substantial.

387 U.S. at 172–73, 87 S.Ct. at 1529. On the other hand, in *Toilet Goods Ass'n* v. *Gardner, supra,* the challenge was to a regulation providing that if a person refused to permit authorized FDA employees access to regulated manufacturing facilities, the FDA might suspend certification service to that person. The Court found a want of ripeness, noting:

> This is not a situation in which primary conduct is affected—when contracts must be negotiated, ingredients tested or substituted, or special records compiled. This regulation merely states that the Commissioner may authorize inspectors to examine certain processes or formulae . . . . Moreover, no irremediable adverse consequences flow from requiring a later challenge to this regulation by a manufacturer who refuses to allow this type of inspection. Unlike the [524] other regulations challenged in this action, in which seizure of goods, heavy fines, adverse publicity for distributing "adulterated" goods, and possible criminal liability might penalize failure to comply, see *Gardner* v. *Toilet Goods Assn., post,* 387 U.S. p. 167, [87 S.Ct. 1526, 18 L.Ed.2d 704], a refusal to admit an inspector here would at most lead only to a suspension of certification services to the particular party * * *.

387 U.S. at 164–65, 87 S.Ct. at 1524–1525.

[7] Thus, it appears from the *Abbott Laboratories* trilogy that one seeking discretionary relief may not obtain pre-enforcement judicial review of agency action if there is no immediate threat of sanctions for noncompliance, or if the potential sanction is de minimis. Conversely, the court should find agency action ripe for judicial review if the action is final and clear-cut, and if it puts the complaining party on the horns of a dilemma: if he complies and awaits ultimate judicial determination of the action's validity, he must change his course of day-to-day conduct, for example, by undertaking substantial preliminary paper work, scientific testing and recordkeeping, or by destroying stock; alternatively, if he does not comply, he risks sanctions or injuries

including, for example, civil and criminal penalties, or loss of public confidence.

[8] In this case, the LB order issued to each of the appellees was clear-cut. As previously rehearsed, there was never any doubt but that the FTC contemplated full and prompt compliance. By the time appellees filed suit, the agency action requiring the LB reports was final: the Commission had denied original motions to quash, as well as renewed and amended motions. Appellees were placed in an immediate and real quandary: if they chose to comply with the LB orders, as more than 200 companies did, they would have had to commit substantial resources—both in terms of money and manpower—to develop accounting techniques necessary for compliance and, as a result, suffer loss of profits;[8] alternatively, they could refuse to comply, await FTC enforcement and risk civil fines for noncompliance. *See A. O. Smith I, supra*, 396 F.Supp. at 1115–16.[9] Thus, the potential harm to appellees seems to fall between the de minimis sanction in *Toilet Goods Ass'n* v. *Gardner, supra*, and the draconian alternatives faced in *Gardner* v. *Toilet Goods Ass'n, supra*, and *Abbott Laboratories* v. *Gardner, supra*. We have determined that these facts more closely approximate those in *Gardner* and *Abbott Laboratories* than those in *Toilet Goods*. Here, the consequences of noncompliance are serious and the effects of compliance on primary day-to-day conduct are immediate. At the very least, the LB orders necessitate changes in internal recordkeeping and accounting. The Supreme Court has acknowledged that such an impact may be sufficiently direct and immediate for ripeness purposes. *Compare Toilet Goods Ass'n* v. *Gardner, supra*, 387 U.S. at 164, 87 S.Ct. 1520, *with Gardner* v. *Toilet Goods Ass'n, supra*, 387 U.S. at 173, 87 S.Ct. 1526.

Accordingly, we hold that the district court did not err either in determining that it had jurisdiction to entertain the complaints or in using its discretion to exercise jurisdiction, because the contro[525]versy surrounding the FTC's action was ripe for judicial decision. The only question remaining is whether the district court committed reversible error in issuing preliminary injunctions.

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[8] The controller of one corporation had estimated compliance with the LB order would require eight months and an expenditure of about $400,000. Tr. Oral Arg. at 20. Other estimates of the cost of compliance exceeded one million dollars per corporation. *See A. O. Smith I, supra*, 396 F.Supp. at 1118.

[9] The district court relied in part on the possibility of criminal sanctions as well. *See A. O. Smith I, supra*, 396 F.Supp. at 1116 & n.12. At oral argument, the Commission asserted that criminal sanctions could not be imposed on appellees because the LB orders were directed to the corporations—not their officers—and the criminal penalties of Section 10 do not apply to corporations. *See, e.g.*, Tr. Oral Arg. at 17. While we agree that the criminal provisions of Section 10 would not obtain against the corporations before us, this does not mean that Section 10 criminal penalties do not lurk in the background. In any event, because of the view we take of the non-criminal impacts of the LB orders, the Commission's point need not detain us.

III.

[9–14] In reviewing the grant or denial of preliminary injunctions over the years, this court has emphasized the following considerations:

1. The law has entrusted the power to grant or dissolve an injunction to the discretion of the trial court in the first instance, and not to the appellate court. *Stokes* v. *Williams*, 226 F. 148, 156 (3d Cir. 1915), *cert. denied*, 241 U.S. 681, 36 S.Ct. 728, 60 L.Ed. 1234 (1916).

2. Unless the trial court abuses that discretion, commits an obvious error in applying the law, or makes a serious mistake in considering the proof, the appellate court must take the judgment of the trial court as presumptively correct. *Ibid; see Oburn* v. *Shapp*, 521 F.2d 142, 147 (3d Cir. 1975); *United States* v. *Ingersoll-Rand Co.*, 320 F.2d 509, 523 (3d Cir. 1963).

3. "This limited review is necessitated because the grant or denial * * * is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success at final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief." *United States Steel Corp.* v. *Fraternal Ass'n of Steelhaulers*, 431 F.2d 1046, 1048 (3d Cir. 1970).

4. In exercising its limited review of the grant or denial of preliminary injunctive relief, the appellate court asks: (a) Did the movant make a strong showing that it is likely to prevail on the merits? (b) Did the movant show that, without such relief, it would be irreparably injured? (c) Would the grant of a preliminary injunction substantially have harmed other parties interested in the proceedings? (d) Where lies the public interest? *Commonwealth of Pennsylvania ex rel. Creamer* v. *United States Dep't of Agriculture*, 469 F.2d 1387, 1388 n.1 (3d Cir. 1972)(per curiam); *Croskey Street Concerned Citizens* v. *Romney*, 459 F.2d 109, 112 (3d Cir. 1972)(concurring opinion). Also see *Oburn* v. *Shapp*, *supra*, 521 F.2d at 147; *Delaware River Port Authority* v. *Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 919–20 (3d Cir. 1974).

5. "The applicant for a preliminary injunction bears the burden of establishing a right to such injunctive relief and that irreparable injury will result to him if it is not granted." *Bancroft & Sons Co.* v. *Shelley Knitting Mills, Inc.*, 268 F.2d 569, 574 (3d Cir. 1959)(footnote omitted). Moreover, we have emphasized "the elementary principle that a preliminary injunction shall not issue except upon a showing of irreparable injury." *National Land & Investment Co.* v. *Specter*, 428 F.2d 91, 97 (3d Cir. 1970).

[15, 16] In examining claimed aspects of the irreparable injury that would befall appellees in the absence of an injunction pendente lite,

two other factors command our attention. First, as previously rehearsed, irreparable harm, as a concept to be considered in the context of a preliminary injunction, is related to, but not the equivalent of, the hardship-to-the-parties ingredient of the *Abbott Laboratories* ripeness test. Second, the requisite is that the feared injury or harm be irreparable—not merely serious or substantial. "The word means that which cannot be repaired, retrieved, put down again, atoned for. * * * Grass that is cut down cannot be made to grow again; but the injury can be adequately atoned for in money. The result of the cases fixes this to be the rule: the injury must be of a peculiar nature, so that compensation in money cannot atone for it * * *." *Gause* v. *Perkins*, 3 Jones Eq. 177, 69 Am.Dec. 728 (1857). "Irreparable injury is suffered where monetary damages are difficult to ascertain or are inadequate." *Danielson* v. *Local 275, Laborers Union*, 479 F.2d 1033, 1037 (2d Cir. 1973). *See generally* E. Re, Cases and Materials on Equity and Equitable Remedies 1018–35 (1975).

Against this backdrop we consider first whether the trial court erred when **[526]** it concluded that the appellees had met their burden of proving they would suffer irreparable harm or injury in the absence of an injunction pendente lite. The district court in *A. O. Smith I* stated:

> The alleged injury suffered by plaintiffs goes either to the unrecoverable costs and commitment of diverse business resources including managerial talent with concomitant loss of profits incident to preparation and compliance with the Commission orders plaintiffs assert to be invalid, or in the event of noncompliance, irreparable harm threatened by criminal and civil sanctions. The immediacy of the injury is evident; plaintiff has already incurred some costs incident to compliance and the time constraints placed upon plaintiffs by the FTC are narrow. The Court concludes plaintiffs will suffer immediate, irreparable injury.

396 F.Supp. at 1118. In its second opinion, the district court amplified:

> Defendants correctly point out that the availability of discovery in summary enforcement proceedings is not categorically foreclosed to either party. Rather, the court to which enforcement application is made has discretion to allow as much discovery as is consistent with the need for expeditious adjudication of the issues before it. *See FTC* v. *Kujawski*, 298 F.Supp. 1288, 1290 (N.D.Ga.1969); *cf. Venn* v. *United States*, 400 F.2d 207, 212 n.12 (5th Cir. 1968); *United States* v. *Moriarity*, 278 F.Supp. 187 (E.D.Wis.1967). This, however, introduces an element into a court's decision to allow discovery in a summary enforcement context which is not present in a plenary pre-enforcement action, i.e., the "tension between speedy adjudication and fairness to the investigated party." *FTC* v. *Kujawski*, 298 F.Supp. at 1290.
>
> In the Court's view, it is this tension which renders plaintiffs' remedy by way of summary enforcement suit inadequate *vis-a-vis* plenary pre-enforcement proceedings. In the context of a summary enforcement suit in which a prompt determination of the need for compliance with an administrative order is demanded, a court may be understandably ill-disposed to grant requests for discovery which would be otherwise permissible in a plenary civil action. *See, e.g., United States* v. *Associated Merchandising Corp.*, 256 F.Supp. 318 (S.D.N.Y.1966).

This is not to say that a pre-enforcement injunction may issue in every instance in which there appears the possibility that discovery in a pending enforcement proceeding may be limited. Where, as here, however, plaintiffs are able to demonstrate a likelihood of success on the merits and may need the panoply of discovery devices envisioned by the Federal Rules if they are ultimately to carry the burden of persuasion, this Court may invoke its equitable powers to afford the discovery needed.

Given the foregoing considerations and in view of plaintiffs' demonstrated need for full discovery on several issues, the Court reiterates that the mandamus proceedings contemplated by the Commission are not an adequate vehicle for the adjudication of rights plaintiffs here assert. Accordingly, * * * the Court concludes plaintiffs will suffer immediate irreparable injury.

A. O. Smith II, supra, 396 F.Supp. at 1134–35 (footnotes omitted). Thus, in concluding that appellees would suffer irreparable injury absent an injunction pendente lite, the district court relied on consideration of: (a) the asserted difference in the scope of discovery available in a pre-enforcement, as opposed to a counter-enforcement, action; (b) "the unrecoverable costs and commitment of diverse business resources * * * incident to preparation and compliance with the Commission orders"; and (c) potential criminal and civil sanctions for noncompliance or faulty compliance.

A.

We may begin by conceding that the scope of discovery in a summary enforcement proceeding *might* be different from that in a plenary suit, just as it [527] *might* be different if the suit were heard in district A instead of district B, or before judge X instead of judge Y. However, we could hardly elevate such a speculative and fortuitous procedural variance to the status of irreparable harm without seriously—perhaps irreparably—undermining the salutary limitation that concept places on the exercise of the injunctive power. Further, we agree with the district court that the availability of discovery in a summary enforcement proceeding is not foreclosed to either party. Whether the matter is litigated now or later, the companies' position will be the same—an attack on the FTC's institution of the LB program: the companies will insist that the full panoply of rule-making procedures apply, while the FTC will contend that its resolution was not rule making but permissible report gathering under Section 6 of the FTC Act. In either case, the compass of available discovery is circumscribed by the requirement that discovery be "relevant to the subject matter involved in the pending action", F.R. Civ.P. 26(b)(1), and not by the form of the action. In either action, discovery may be "limited by order of the court," F.R.Civ.P. 26(b). If the action is a summary enforcement under Section 9, there may be a " 'tension between speedy adjudication and fairness to the investigated party' ", *A. O. Smith II, supra*, 396 F.Supp. at 1134, suggesting that bounds to

discovery be set. On the other hand, if the action is for pre-enforcement review, as here, the district court must bear in mind that what is to be reviewed is administrative agency action entitled to some judicial deference; accordingly, full, unbridled discovery may be inappropriate. *Cf. Dunlop* v. *Bachowski*, 421 U.S. 560, 571, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975). Indeed, in this pre-enforcement action, the district court has limited the scope of appellees' discovery. We conclude, therefore, that the possible variation between the scope of discovery available to appellees in this action and the scope of discovery that would be available to them in defending a later enforcement action does not constitute irreparable harm for purposes of a preliminary injunction. Our conclusion that the variation is only possible necessarily encompasses a determination that, in any event, appellees failed to carry their burden on this aspect of their claimed irreparable injury.

B.

In *A. O. Smith I*, *supra*, the district court alluded to the claim of unrecoverable costs of compliance as an element of irreparable injury. In the context here presented, we find that this asserted harm did not constitute irreparable injury. At issue was a *preliminary* injunction—a form of relief requiring a strong showing of necessity. Furthermore, the alleged injury was "unrecoverable costs and commitment of diverse business resources." Without intending to disparage the importance of such an injury, we observe that all that is lost is profits. Any time a corporation complies with a government regulation that requires corporation action, it spends money and loses profits; yet it could hardly be contended that proof of such an injury, alone, would satisfy the requisite for a preliminary injunction. Rather, in cases like these, courts ought to harken to the basic principle of equity that the threatened injury must be, in some way, "peculiar".[9*] *See Gause* v. *Perkins*, *supra*. These are not "small" corporations; there is no contention that compliance with the LB program would render any appellee unable to meet its debts as they [528] come due. Nor is there any contention that the cost of compliance would be so great *vis a vis* the corporate budget that significant changes in a company's operations would be necessitated. Nor is this a case where compliance would permanently injure the corporation's reputation, or its goodwill.

[9*] We have not here attempted "to fashion a general rule—applicable to other factual situations * * *," as inferred in the instant concurring opinion. We formulate only a specific rule,—we draw a "definite detailed legal consequence" from "a definite detailed state of facts." Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 Tul.L. Rev. 475, 482 (1933). We do not subscribe to the concurring opinion's interpretation, *post* n.2, that we would require as a minimum showing for purposes of proving irreparable harm in the pendente lite context "a corporate liquidity crisis or significant changes in company operations." Nor do we subscribe to the concurring opinion's implication that statistical figures from government reports can never serve as an evidentiary predicate for a finding of irreparable harm.

If, in the final analysis, the Commission's authority to order the reports is upheld, the cost of compliance will have to be considered a necessary business expense, albeit government mandated, and not a loss of profits in any usual sense of that term.

Moreover, even assuming that the asserted harm could, in these circumstances, constitute irreparable injury, the district court's summary conclusion on the irreparable harm issue is unsupported by basic findings of fact. The district court's opinion made reference to the median cost of compliance ($50,000) and to estimates that some companies might have to expend in excess of one million dollars in preparing LB reports. *A. O. Smith I, supra*, 396 F.Supp. at 1118. But it did so in the context of discussing the public interest, not irreparable injury. Moreover, the sources of these figures were government reports,[10] not specific evidence submitted by appellees. *See* App. at 48, 100. In *A. O. Smith II, supra*, on the other hand, the district court did not even mention the claim of unrecoverable costs in its analysis of irreparable injury.

At this juncture, we hasten to add that we do not reach the question of whether, if proved at final hearing, loss of profits from compliance with the LB orders could constitute irreparable injury in the context of a permanent injunction.[11] We specifically reserve that issue for another day.

C.

The district court's reliance on the possibility of civil fines—in the amount of $100 a day to commence 30 days after the FTC served a notice of default—was also misplaced. The appellees, as previously noted, are not "small" corporations. The FTC resolution to require LB reports stemmed from recommendations in a memorandum from Russell C. Parker, Assistant to the Bureau of Economics, reprinted in "Role of Giant Corporations," *Hearings Before the Subcommittee on Monopoly of the Senate Select Committee on Small Business*, 92d Cong., 1st Sess. Pt. 2A at 1807–17 (1972). Nor, as previously stated, are we confronted with a situation where any appellee has proved that

[10] The median cost figure was contained in the Commission's memorandum in support of its denial of all motions to quash. App. at 100. The estimates of compliance costs exceeding one million dollars originated in the Comptroller General's evaluation of the LB program. The latter report, in turn, was based on submissions from several companies, including several appellees, *see* App. at 56–57, but none of the appellees at No. 75-1282 was among the companies whose estimates of cost the Comptroller General summarized, *see* App. at 48.

Appellees submitted affidavits and adduced testimony which might have supported a specific finding on the point, but the district court did not predicate its conclusion of irreparable injury on those materials.

[11] Although certain references have been made to the application for a permanent injunction, we note that appellees also sought declaratory relief. For similarities and differences in standards relating to injunctive and declaratory relief *see Steffel* v. *Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Zwickler* v. *Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967).

compliance with the LB program would render it unable to meet its debts as they come due.[12] In these circumstances, we conclude that the threat of civil penalties was de minimis; in the context of the required showing for a preliminary injunction it did not rise to the level of irreparable injury.

Finally, in assessing irreparable injury, the district court alluded to possible criminal penalties. Appellants vehemently contend that appellees are not subject to criminal sanctions. *See* n.9 *supra*. Whatever the merit of appellees' rebuttal to that argument as it affects ripeness, the brute fact is that, in the context of the irreparable injury element **[529]** requisite to a preliminary injunction, appellees have failed to prove that absent an injunction pendente lite *they* would be subject to criminal sanctions.

[17] Accordingly, we hold that the district court erred in finding that appellees had sustained their burden of proving irreparable injury. Such a finding is a necessary ingredient to the issuance of a preliminary injunction. *National Land & Investment Co.* v. *Specter*, *supra*. Therefore, the district court's order may not stand. Nor need we reach other issues tendered by the parties in this appeal, *viz.*, the appellees' likelihood of success on the merits, the effect of a preliminary injunction on other interested parties, or the public interest in the grant or denial of a preliminary injunction.

That part of the district court's order denying appellants' motion to dismiss the complaints for want of jurisdiction will be affirmed; that part granting preliminary injunctions will be vacated.

ADAMS, *Circuit Judge* (concurring):

I agree with parts I and II and with section C of part III of the majority opinion. In reversing the grant of the preliminary injunctions entered in this case, however, I would limit our holding to the failure of the plaintiffs to demonstrate, in the record before the district court, irreparable harm. Such a course would avoid the resolution of issues that need not be decided at this time.

Some cost of compliance with a Federal Trade Commission order is concededly inevitable, but the record here does not show with particularity the burden such compliance would impose upon the individual plaintiffs. To find irreparable harm in this regard the district court appears to have relied only on statistical figures from governmental reports.[1] A record this scanty is inadequate, in my judgment, to show irreparable injury by any standard. Thus, there does not appear to be any need for the Court to fashion a general

[12] We express no opinion on whether a different rule might obtain in circumstances different from those before us.

[1] *See* majority opinion at 527 *supra*.

rule—applicable to other factual situations—for determining whether the cost of compliance would inflict irreparable injury.[2]

Nor is there a basis in the record for concluding that differences in the extent of discovery, depending upon the type of proceeding available to the litigants, can never constitute irreparable harm.[3] The record in this case does not establish that mandamus proceedings would necessarily occasion a scope of discovery so much narrower than the scope of discovery available in this suit for injunctive relief that plaintiffs would be irreparably harmed thereby.

[2] *Compare* majority opinion at 527 *supra*. I am not prepared to hold, at least on the basis of this record, that, short of provoking a corporate liquidity crisis or significant changes in company operations, cost of compliance can never be the basis of a finding of irreparable harm for the purpose of granting injunctive relief.

[3] The plaintiffs contend that without a preliminary injunction they will be subjected to enforcement proceedings in the Southern District of New York. In that event, plaintiffs contend, discovery might be limited because enforcement by mandamus is a summary proceeding in which a court may curtail recourse to discovery that is otherwise available in plenary civil actions such as the present suit for injunctive relief.

UNITED STATES OF AMERICA v. THE FIRESTONE TIRE & RUBBER CO.*

No. C 76-50A. F.T.C. Docket No. 8818.

(United States District Court, Northern District of Ohio, Eastern Division, February 13, 1976)

In settlement of a civil penalty suit filed against a tire manufacturer for violations of an order to cease and desist issued by the Federal Trade Commission, judgment called for $50,000 in penalties; $750,000 to be spent by firm on informative tire safety advertising; and strict compliance with the terms of the cease and desist order barring misrepresentations with respect to safety claims.

Frederick M. Coleman, U.S. Atty., *Eric M. Rubin*, Asst. Director of Compliance, *Joseph J. Koman, Jr.*, Atty., Bureau of Consumer Protection, *William S. Sanger*, Atty., Bureau of Consumer Protection, for plaintiff.

John F. Floberg, and *William R. Jentes*, of *Kirkland & Ellis*, for defendant.

Before CONTIES, *District Judge*.

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on — — and the parties hereto, by their respective attorneys, having consented to the making and entry of this Final Judgment, prior to the taking of any testimony, without trial or adjudication of any issue of fact or law herein, and without admission by either party in respect to any issue, and defendant having expressly denied any liability under the complaint;

Now, therefore, prior to the taking of any testimony, before any adjudication of any issue of law or fact herein, and upon consent of the parties hereto, it is hereby

Ordered, adjudged and decreed as follows:

I.

This Court has jurisdiction over the subject matter of this action and of the parties hereto. The complaint states claims upon which relief may be granted under Section 5(*l*) of the Federal Trade Commission Act (15 U.S.C. § 45(*l*)).

II.

As used in this Final Judgment:

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶60,729 at 68,134 (1976-1 Trade Cases). For case before the Commission, see 81 F.T.C. 398.

A. "Plaintiff" refers to the United States of America, acting on behalf of the Federal Trade Commission.

B. "Bureau" refers to the Bureau of Consumer Protection, Federal Trade Commission.

C. "Defendant" refers to The Firestone Tire & Rubber Company, a corporation, its successors and assigns, officers, agents, representatives, employees, subsidiaries and divisions.

D. "ASI" refers to ASI-Audience Studies, Inc.

E. "Component" refers to either the belt portion or body ply portion of a tire.

F. Any reference to a "material" (other than rubber) shall mean a reference to the generic name of the material.

III.

The defendant shall pay plaintiff the sum of $50,000.00 together with the cost of suit. Such amount shall become due and payable within fifteen (15) days after entry of this Final Judgment. Payment shall be by certified check, payable to the Treasurer of the United States and delivered to the Collections Clerk, Office of the United States Attorney for the Northern District of Ohio. In the event of default, interest at the rate of 6 percent per annum shall accrue from the date of default to the date of payment. Upon filing of an affidavit by an authorized representative of plaintiff certifying that defendant is in default, the Clerk of this Court shall enter judgment for the full amount against defendant without further notice to defendant.

IV.

The defendant is hereby ordered to produce, pre-test and run a television commercial and print advertisement with resepct to tire safety in accordance with the following procedures:

A. Within ten days after entry of this Final Judgment, defendant shall commence the production of the television commercial (hereinafter "TV commercial"), the storyboard for which is attached as Exhibit 1 to this Final Judgment.

B. While the proposed TV commercial is being produced, Firestone shall submit to the Bureau a detailed description of the procedures to be followed by ASI for the initial and final pre-testing of the TV commerical to determine if it will effectively communicate to viewers: (1) that tires are not safe under all conditions of use, and (2) that proper tire safety depends upon the consumer taking specific steps for the proper maintenance of his tires and upon the manner in which he operates his vehicle. Such description shall include the questions to be asked and the procedures and standards to be used in evaluating the

initial and final pre-test results. Upon approval of this description by the Bureau and completion of a storyboard film of the TV commercial, the initial pre-test will be conducted and the results submitted to the Bureau for approval.

C. In the event the Bureau finds that the results of the initial pre-test meet the standards for acceptability as set out in the description of pre-test procedures referred to in subparagraph B, Firestone shall promptly prepare a film of the TV commercial and submit such film to ASI for final pre-testing to determine if the TV commercial will effectively communicate to viewers the information referred to in subparagraph B above.

D. In the event the Bureau finds that the results of the final pre-test meet the standards for acceptability as set out in the description of pre-test procedures referred to in subparagraph B, Firestone shall expend a minimum of $550,000 for the running of the TV commerical in accordance with the schedule attached as Exhibit 2 to this Final Judgment. This shall be in addition to the cost of producing and pre-testing the TV commercial referred to in subparagraph F hereafter.

E. Upon approval of the results of the final pre-test referred to in subparagraph D above, defendant shall also promptly prepare and submit to the Bureau a proposed print advertisement (hereinafter "print advertisement") which adopts and follows the theme of the final version of the TV commercial. Upon approval of the print advertisement by the Bureau, defendant shall expend a minimum of $100,000 for the running of such advertisement in accordance with the schedule attached as Exhibit 3 to this Final Judgment. This shall be in addition to the cost of preparing the proposed print advertisement.

F. Defendant shall allocate all necessary funds for the preparation of the television commercial and print advertisement, including pre-testing. In the event the cost for such preparation and pre-testing is less than $100,000, defendant shall add the difference between the actual cost and $100,000 to the sum to be expended in the running of the TV commercial referred to in subparagraph D above.

G. Defendant shall have eighteen months from the final approval of the TV commerical and the print advertisement in which to complete the running of the advertisements pursuant to subparagraphs D and E, providing that defendant conforms to the schedules attached as Exhibits 2 and 3. Subject to the same proviso, defendant shall have the right to select the precise timing and placement of the TV commercial and print advertisement, including the right to run the TV commercial on programs with other defendant commercials so long as the TV commerical is not run immediately after or before another commercial without program break.

H. In the event the Bureau does not approve the pre-testing

procedures described in subparagraph B, the Bureau shall promptly notify defendant of its specific objections thereto and defendant shall promptly submit alternate pre-testing procedures for the approval of the Bureau. In the event the Bureau does not approve the proposed TV commercial (following either the initial or final pre-testing described in subparagraphs C and D above, or in the event the Bureau does not approve the proposed print ad submitted pursuant to subparagraph E above, defendant shall revise, in whole or in part, the disapproved commercial or ad and submit a new proposed commercial or ad pursuant to the procedures specified above.

I. The TV commercial and print advertisement shall contain no reference to defendant or its corporate logo, or any portrayal of any of defendant's products, except that: (1) the TV commercial shall contain a sponsor identification at the end, after a short black-out, stating "This message paid for by Firestone" in small but legible black letters on a white background without any audio corporate identification and shown for not in excess of six seconds, unless further sponsor identification shall be required by the Federal Communications Commission; and (2) the print advertisement shall contain no sponsor identification unless sponsor identification shall be required by the respective publication. The identification of defendant in both the TV commercial and print advertisement shall be approved by the Bureau prior to the running of the TV commercial and print advertisement.

V.

The defendant is enjoined and restrained, in connection with the advertising, offering for sale, sale or distribution of automobile passenger tires in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, from:

A. Representing, directly or by implication, that any tire is constructed entirely of steel and rubber, unless such is the fact.

B. Representing, directly or by implication, that any tire is constructed entirely of a particular material when only a part of the tire is constructed of the particular material.

C. Failing to disclose whenever any reference is made to a material, where one of the tire's components is not constructed of the material referred to, the component of the tire which is constructed of such material. Provided, that whenever reference is made in the tire's name to more than one material, defendant need not disclose as part of such name the components in which such materials are used if the components that are constructed of such materials are otherwise clearly and conspicuously disclosed in any advertisement in which the name of the tire appears.

Nothing in this Paragraph shall be construed as requiring the

disclosure of the percentage content of any material that is incorporated in a tire and an advertisement containing the representations set forth in subparagraphs A and B shall not be deemed in violation thereof because the components or other portions of the tire contain materials, such as beads, adhesives and cord coverings, which consist of materials other than those stated in the representation.

VI.

The defendant is ordered to forthwith deliver a copy of Paragraph V of this Final Judgment to each of its operating departments, divisions, and subsidiaries engaged in the advertising, offering for sale, sale or distribution of automobile passenger tires, and to the manager of each present and future retail automobile passenger tire outlet owned and operated by defendant in the United States.

VII.

The defendant is enjoined and restrained from violating each and every provision of the Final Order to cease and desist issued by the Federal Trade Commission in Docket No. 8818 on September 22, 1972.

VIII.

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the interpretation or modification of this Final Judgment, for the enforcement of compliance therewith, or for the punishments of violations thereof.

FEDERAL TRADE COMMISSION v. JERRY E. FELDMAN, President and CHECKER TAXI COMPANY, INC.*

No. 75–1583. F.T.C. File No. 99–183.

(United States Court of Appeals, Seventh Circuit, February 24, 1976)

1. IN VIEW OF POTENTIAL DIFFERENCES BETWEEN CITED CASES AND SCOPE OF F.T.C.'S INVESTIGATION, COURT DECISION ON RES JUDICATA EFFECTS OF THOSE CASES WOULD BE PREMATURE; DEFENDANTS CAN MAKE THEIR DEFENSE UPON ACTUAL ISSUANCE OF F.T.C. COMPLAINT.

[1092] A decision by the district court, in which a petition was filed by the Federal Trade Commission for enforcement of subpoenas duces tecum in connection with an investigation of taxicab company presently being conducted, on the res judicata effects of two other taxicab company cases decided in the 1940's would be premature in light of the potential differences in facts and law between those cases and the alleged scope of the current FTC investigation; it would be more appropriate and orderly procedure for the FTC to proceed with the investigation within its discretion and, if it should ultimately issue a complaint, defendants would then have an opportunity to assert the defense of res judicata or collateral estoppel.

2. EXCEPT UNDER LIMITED AND EXTRAORDINARY CIRCUMSTANCES, COURT SHOULD NOT INTERFERE WITH ADMINISTRATIVE PROCESS.

Court should not interrupt the administrative process except under very limited and exceptional circumstances.

3. ADMINISTRATIVE PROCESS CAN ONLY BE BYPASSED WHERE AGENCY HAS CLEARLY VIOLATED RIGHT MANDATED BY STATUTE OR REGULATION, OR WHEN A STRICTLY LEGAL ISSUE CANNOT BE RAISED AT JUDICIAL REVIEW OF SUBSEQUENT ORDER.

A party may bypass the administrative process when the agency has clearly violated a right secured by statute or agency regulation, when the issue involved is a strictly legal one not involving the agency's expertise or any factual determinations, or when the issue cannot be raised upon judicial review of a later order of the agency.

4. COMPANY'S CLAIM THAT F.T.C.'S INVESTIGATION ENCROACHED ON LOCAL AUTHORITY WAS PREMATURE.

Claim of taxicab company and its president, who were being investigated by the Federal Trade Commission to determine whether their activities were being conducted in an unfair manner for the purpose or with the effect of restraining or foreclosing competition in violation of the Federal Trade Commission Act, that the investigation by the FTC was an improper attempt to invade the regulatory authority of the city of Chicago was premature; whatever effect the *"Parker* v. *Brown"* doctrine might have in the FTC proceeding could be determined only when the issues became known and even then could probably not be the proper subject of judicial examination until review of a final FTC order.

5. SINCE THEY WERE NOT CLEARLY IRRELEVANT, DISTRICT COURT

* Reported in 532 F.2d 1092 (1976).

PROPERLY REFUSED TO LIMIT OR BAR SPECIFICATIONS CALLING FOR PARTICULAR DETAILS OF COMPANY'S BUSINESS OPERATIONS.

In respect to subpoenas duces tecum issued in connection with taxicab company investigation presently being conducted by the Federal Trade Commission, specifications calling for details as to levels of com[1093]pensation for drivers, tips performed in same periods, identification, leaves, and compensation of each driver, labor agreements and training programs were not clearly irrelevant, and the district court thus properly refused to limit or foreclose those specifications.

(Syllabus, with substituted captions, taken from 532 F.2d 1092)

On appeal from district court enforcement of F.T.C. subpoenas duces tecum, Court of Appeal held, inter alia, that a district court decision on res judicata effects of two previous taxicab cases of the 1940's would be premature; proceeding with F.T.C. investigation would be more appropriate and orderly; and that defendants could have opportunity to assert defense of res judicata or collateral estoppel on issuance of agency complaint.

Affirmed.

Lee A. Freeman, Chicago, Ill., for respondents-appellants.

Samuel K. Skinner, U.S. Atty., Chicago, Ill., *Barry R. Rubin*, Atty., Federal Trade Commission, Washington, D.C., for petitioner-appellee.

Before FAIRCHILD, *Chief Judge*, HASTINGS, *Senior Circuit Judge*, and PELL, *Circuit Judge*.

FAIRCHILD, *Chief Judge:*

This is an appeal from a district court order requiring appellants Jerry L. Feldman, President, Checker Taxi Company, Inc. and Checker Taxi Company, Inc., (hereafter referred to jointly as "Checker"), to comply with subpoenas *duces tecum* issued in connection with an investigation presently being conducted by the Federal Trade Commission.[1]

Section 6(a) of the Federal Trade Commission Act (15 U.S.C. § 46(a)) authorizes the Commission "to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, * * * and its relation to other persons, partnerships, and corporations." Section 9 (15 U.S.C. § 49) empowers the Commission "to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." The nature of the present investigation is, as stated in the resolution of the Commission, directing use of compulsory process, dated January 3, 1973:

[1] *Federal Trade Commission v. Jerry L. Feldman, President and Checker Taxi Company, Inc.*, Civil No. 74 C 2787 (N.D.Ill., filed April 30, 1975).

To determine whether or not the activities and practices by Checker Motors Corporation, Checker Taxi Cab Company, Inc., Yellow Cab Company, Inc. (Chicago), in connection with the regulation, ownership and operation of taxi services, in commerce, are conducted in an unfair manner for the purpose or with the effect of restraining or foreclosing competition, in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

15 U.S.C. § 45(a)(1) declares unlawful "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[2]

The Commission issued subpoenas *duces tecum* seeking documents dealing with the business operations of Checker, its subsidiaries and affiliates. Checker filed a motion to quash the subpoenas and to close the investigation. By order and opinion issued January 31, 1974, the Commission denied the motion. A petition for enforcement of the subpoenas was subsequently filed in the district court. On April 30, 1975, the court issued a final order granting enforcement, although reserving jurisdiction to alleviate vexation and hindrance. Checker appealed.

I.

Appellants assert that the district court erred in failing to apply the doctrines of *res judicata* and collateral estoppel. They rely on the judgment and decisions reached in an action brought by the United States in the 1940's against Yellow Cab Company and others to restrain alleged violations of §§ 1 and 2 of the Sherman Act. They contend that these decisions establish, since appellants have presented affidavits showing that relevant practices have not changed, that the present FTC investigation and any complaint proceeding which could result are foredoomed to futility.

[1094] In the *Yellow Cab Co.* action, the district court first dismissed the complaint, *United States* v. *Yellow Cab Co.*, 69 F.Supp. 170 (N.D.Ill.1946). The decision was reversed (in part), 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947). After trial on remand, judgment was entered for defendants, 80 F.Supp. 936 (N.D.Ill.1948). The judgment was affirmed, 338 U.S. 338, 70 S.Ct. 177, 94 L.Ed. 150 (1949). The appellants here are either identical to or successors in interest of defendants in *Yellow Cab Co.*

A similar subpoena, directed to others, but part of the same investigation, was considered in *F.T.C.* v. *Markin*, 391 F.Supp. 865 (W.D.Mich.1974). Pointing out that the Sherman Act claims in the earlier litigation and claims which the FTC might pursue arise under different statutes, and referring to limiting language in the Supreme

[2] The foregoing statutory quotations reflect amendments enacted January 4, 1975.

Court *Yellow Cab Co.* decisions, the district court in Michigan rejected the *res judicata* claim.

[1] In the instant case, the district court said:

> [A] decision by this Court on the *res judicata* effects of the two *Yellow Cab* cases would seem to be premature in light of the potential differences in facts and law between those two cases and the alleged scope of the current FTC investigation. Similarly, a decision on the "in commerce" issue would be premature. In its first *Yellow Cab* decision, the Supreme Court expressly stated that it did not intend to establish any absolute rule that local taxi service was "beyond the reach of federal power." 332 U.S. at 232, 67 S.Ct. 1560.

We agree with the district court.

In *U. S.* v. *Yellow Cab, supra*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947), the Court reviewed the district court's dismissal of a complaint claiming three types of violation of Sections 1 and 2 of the Sherman Antitrust Act. As to two charges, conspiracy to eliminate competition in the business of transporting passengers between different Chicago railroad stations, and conspiracy to restrain and monopolize the sale of taxicabs by control of the principal companies operating them in several cities, the Supreme Court reversed, holding that the complaint stated a cause of action under the Sherman Act. The third allegation charged Yellow Cab with conspiracy to restrain trade in the transportation of interstate travelers by taxicab between Chicago railroad stations and intra-city destinations such as homes, offices and hotels. The Court decided that this type of transportation "is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act." 332 U.S. at 230, 67 S.Ct. at 1567. The Court said:

> * * * These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations, admittedly cross no state lines; by ordinance, their service is confined to transportation "between any two points within the corporate limits of the City." None of them serves only railroad passengers, all of them being required to serve "every person" within the limits of Chicago. They have no contractual or other arrangements with the interstate railroads. Nor are their fares paid or collected as part of the railroad fares. In short, their relationship to interstate transit is only casual and incidental. 332 U.S. at 230–31, 67 S.Ct. at 1567.

The Court went on to hold that "a restraint on or monopoly of that general local service, without more, is not proscribed by the Sherman Act," and that as to local service of that type, the complaint failed to state a cause of action under the Sherman Act.

On the basis of a showing by affidavit that the relevant character of their activity has not changed, appellants argue that the Commission is barred from relitigating whether practices in the operation of taxis, including advertising for drivers, constitute a restraint of competition in or affecting commerce. They would, in effect, require that in order

to obtain enforcement, the FTC must at this preliminary stage, postulate factual changes in the operation of appellants' business or changes of law or relevant differences between the Sherman [1095] Act and the FTC Act sufficient to demonstrate that an FTC proceeding could be brought in 1975 which could escape the *res judicata* defense.

Appellants take this position despite the fact that the Supreme Court, in *Yellow Cab Co.*, was very careful to limit its determination to the specific facts presented. The Court said:

> We do not mean to establish any absolute rule that local taxicab service to and from railroad stations is completely beyond the reach of federal power or even beyond the scope of the Sherman Act * * * [W]e are not to be understood in this case as deciding that all conspiracies among local cab drivers are so unrelated to interstate commerce as to fall outside the federal ken. . . . 332 U.S. at 232–33, 67 S.Ct. at 1568.

We deem it the more appropriate and orderly procedure for the Commission to proceed with the investigation within its discretion. If it ultimately issues a complaint, appellants will then have an opportunity, depending on the issues raised by the complaint, or the proof thereunder, to assert the defense of *res judicata* or collateral estoppel, if they see fit.

In *U.S.* v. *Yellow Cab Co.*, *supra*, 338 U.S. 338, 70 S.Ct. 177, 94 L.Ed. 150 (1949), *aff'g* 80 F.Supp. 936 (N.D.Ill.1948), the district court had determined at trial that the evidence was insufficient to support the claim that Yellow Cab conspired to restrain trade in the sale of taxicabs. The Supreme Court affirmed on the basis that the trial court's findings were not clearly erroneous, pointing out that many of the significant findings resolved issues with respect to intent in certain transactions.

Appellants point in particular to a finding by the district court in *Yellow Cab Co.* that the companies' decision to buy CCM "purpose built" cabs was a reasonable and natural business judgment which "should not, on the evidence, be disturbed by the Court." Appellants, having shown by affidavit that there is presently only one source of purpose built taxi vehicles, contend that the findings of lawful motivation of purchases made in the 1940's legally precludes the Commission's investigation in the 1970's of the motivation of more recent purchases. They contend that this has been made so clear that the court should stop the Commission's activity at the beginning of the investigation stage. This argument is even less persuasive than the earlier one.

[2] It is well settled that the courts should not interrupt the administrative process except under very limited and exceptional circumstances. *See Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41,

58 S.Ct. 459, 82 L.Ed. 638 (1938). We conclude that the doctrines of *res judicata* and collateral estoppel are prematurely raised by appellants.

In discussing exhaustion of administrative remedies the Supreme Court stated in *McKart* v. *U.S.*, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1965):

* * * * * * *

A primary purpose [of the doctrine of exhaustion of administrative remedies] is, * * * the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise * * * [I]t is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages * * *. 395 U.S. at 193–94, 89 S.Ct. at 1662.

The courts have been reluctant to interfere in the investigative stage of the administrative process. In *Okla. Press Pub. Co.* v. *Walling*, 327 U.S. 186, 214, 66 S.Ct 494, 508, 90 L.Ed. 614 (1946), the Supreme Court stated:

[1096] * * * Congress has authorized [the agency], rather than the District Courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations; * * * to exercise [the agency's] subpoena power for securing evidence upon that question * * * and, in case of refusal to obey [the agency's] subpoena, to have the aid of the District Court in enforcing it. * * *

In reference to the *Oklahoma Press* decision, the court, in *F.T.C.* v. *Gibson*, 460 F.2d 605, 608 (5th Cir. 1972), stated:

The rationale of the *Oklahoma Press* rule is that it allows enforcement of subpoenas where the evidence necessary to establish the interstate nature of the commerce involved is in the possession of the suspected violator and can be secured only by . . . a subpoena. Under this rule appellants may not litigate the jurisdictional issue as a defense in a subpoena enforcement proceeding.

[3] In *Borden, Inc.* v. *FTC*, 495 F.2d 785, 786–87 (7th Cir. 1974) we noted the situations in which a party may bypass the administrative process. These situations arise when:

(1) the agency has clearly violated a right secured by statute or agency regulation, *Leedom* v. *Kyne*, 358 U.S. 184, 188–189, 79 S.Ct. 180, 3 L.Ed2d 210 (1958); *Elmo Division of Drive-X Company* v. *Dixon*, 121 U.S.App.D.C. 113, 348 F.2d 342, 346–347 (1965); (2) the issue involved is a strictly legal one not involving the agency's expertise or any factual determinations, *Jewell Companies, Inc.* v. *F.T.C.*, 432 F.2d 1155, 1159 (7th Cir. 1970); *McKart* v. *United States*, 395 U.S. 185, 197–199, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969); or (3) the issue cannot be raised upon judicial review of a later order of the agency, *Jewel*, supra, at 1159.

In the instant case the FTC is conducting an investigation to determine whether there are violations of section 5 of the Federal Trade Commission Act (15 U.S.C. § 45). The subpoenas represent the Commission's attempt to obtain factual information needed in the development of a decision as to what, if any, action should be taken, and for use in a proceeding if instituted. Interpretation of this factual information necessarily involves agency expertise and discretion. The Commission is aware, of course, of the *Yellow Cab Co.* case and will doubtless give consideration to the effect it would be expected to have on any proceeding the Commission might bring.

Appellants rely on two decisions which applied the doctrine of *res judicata* in a second proceeding by an agency of the federal government so as to give conclusive effect therein to a determination made in an earlier proceeding brought by a different federal agency against the same party. As a result the court vacated a cease and desist order of the FTC in *George H. Lee* v. *Federal Trade Commission*, 113 F.2d 583 (8th Cir. 1940), and affirmed an order dismissing a proceeding for condemnation of a product on the ground of false labeling in *United States* v. *Willard Tablet Co.*, 141 F.2d 141 (7th Cir. 1944). Neither decision is authority for a court's interfering at the investigative stage of an administrative proceeding on the theory that a decision in some earlier case conclusively establishes a determination that there can be no merit in a proceeding growing out of the investigation. In each of the cases cited, the doctrine of *res judicata* was applied to a proceeding which had ripened to a point that the issues had been developed.

Safir v. *Gibson*, 432 F.2d 137 (2d Cir. 1970) is a case in which a court applied the doctrine of *res judicata* to an administrative proceeding without waiting until a final order was ready for review. *Safir* is easily distinguished from the instant case.

The Federal Maritime Commission found that certain subsidized members of a steamship conference had set unreasonably low rates in an effort to drive out competitors and thereby violated 46 U.S.C. § 814. Safir brought action to compel the Maritime Administration to recover subsidies paid to the offenders. When the case first reached the Court of Appeals, the court decided that the Administration was required to make a con[**1097**]sidered decision whether to recover the subsidies. *Safir* v. *Gibson*, 417 F.2d 972 (2d Cir. 1969). The Administration concluded that it should begin by determining, in effect, whether the rates had been unfair or unduly discriminatory. In the second *Safir* decision, the Court of Appeals directed the district court to instruct the Administration not to redetermine the issue previously decided (although in the context of a different statute) by the Commission.

The Court of Appeals recognized the "general rule against judicial

interference with administrative proceedings prior to the issuance of a final order," but felt there were two features of the case rendering appropriate the immediate application of *res judicata* and estoppel principles. One was the need to protect the party who succeeded in the first proceeding "from being vexed with needlessly duplicitous proceedings." The other was that the proceeding before the Administration was being carried on virtually as if in response to an order of the court, and if such order had issued, "the court would have had discretionary power to modify or clarify it if such action appeared necessary because the agency misunderstood the nature of the proceeding required." Clearly the peculiarities of the *Safir* situation are not present here.

In *F.T.C.* v. *Texaco, Inc.*, 170 U.S.App. D.C. 323, 517 F.2d 137 (D.C.Cir.1975), *vacated and reh'g en banc granted Feb 6, 1976*, the district court had limited FTC subpoenas of data on natural gas reserves, taking into consideration a previous investigation made by FPC and findings resulting therefrom. The FPC had found in 1970 that certain estimates of proved reserves of natural gas were valid and accurate. The FTC, in late 1971, issued subpoenas requiring production, apparently of *"all* reserve records in order to determine the total gas reserves of the area. Since the Power Commission had already determined that AGA figures were accurate, the [district] court was of the view that the Trade Commission could not force the producers to relitigate the matter and that, in any event, it would be unduly *burdensome* to permit yet another plenary investigation (for the third time in two years) of natural gas reserves." 517 F.2d at 144.

The Court of Appeals affirmed. After concluding that the application of collateral estoppel would be appropriate in the case, the court held that the district court was entitled to conclude that FTC desired all data in order to recompute independently the area reserves and that the FPC, after a contested hearing, had found the industry's figures for the relevant years were accurate. In the light of these findings, the district court "has drawn a reasonable balance" between the needs and interests of the parties.

Although the panel decision, now vacated, supported the propriety of consideration if not total application of the doctrine of collateral estoppel in judicial limitation of administrative subpoenas in a pending investigation, without awaiting a final order, it seems clear that in upholding such limitation by the district court the panel was impressed by the closeness in time between the determination of the particular fact by FPC and the proposed re-examination of the same fact by FTC.

In the case before us now, more than twenty-five years have elapsed since the earlier determinations. Not only may the immediate facts and circumstances as to the activities and practices of Checker have

changed in the interim, but the more general economic and social considerations which mold views as to whether activities and practices affect interstate commerce may have changed significantly.

II

[4] Appellants also claim that the Commission's investigation is an improper attempt to invade the regulatory authority of the City of Chicago. They contend that because the city has enacted certain ordinances providing for the regulation of local taxicab services, any activities undertaken which adhere to the regulatory scheme cannot form the basis of an antitrust violation.

[1098] Appellants rely on *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), in which the Supreme Court determined that imposition by the state of a state marketing program which sought to stabilize raisin production and maintain prices did not conflict with the Sherman Act. The Court reasoned that because the marketing program derived its authority from the legislative command of the state it was in effect state action and not intended to be covered by the Sherman Act. 317 U.S. at 350–52, 63 S.Ct. 307.

We find this challenge premature. Whatever effect the *Parker* v. *Brown* doctrine might have in an FTC proceeding against Checker could be determined only when the issues in such proceeding become known and even then could probably not be the proper subject of judicial examination until review of a final order of FTC.

III

[5] Appellants' final claim is that the district court failed to exercise proper judicial supervision by refusing to limit or foreclose certain specifications of documents required to be produced. The challenged specifications, paragraphs 10 through 15, call for details as to levels of compensation for drivers, trips performed in sample periods, identification, leaves, and compensation of each driver, labor agreements and training programs.

We are not persuaded that these specifications are clearly irrelevant to an investigation within the Commission's power. *See F.T.C.* v. *Standard American, Inc.*, 306 F.2d 231, 234–35 (3rd Cir. 1962).

The district court recognized the possibility that production of evidence in the detail specified might be shown to be more burdensome in some instances than the degree of relevance of particular items justified. The court provided in its order:

> The parties will, prior to the production of evidence, pursuant to the Federal Trade Commission's offer, meet in a good faith effort to modify the subpoena's terms so as to make compliance with its specifications not unduly burdensome on respondents.

In the event that compliance with the subpoena's terms becomes patently vexatious and serious hindrance to the pursuit of respondent's business, the parties may file the appropriate supplemental motions, fully supported by briefs, and the Court will reconsider those specifications thus put in issue in supplemental proceedings.

The order appealed from is affirmed.

GIFFORD-HILL & CO., INC. v. FEDERAL TRADE COMMISSION*

Civ. A. No. 75–1033. F.T.C. Docket No. 8989.

(United States District Court, District of Columbia, February 26, 1976)

In denying access, under the Freedom of Information Act, to non-segregable confidential information submitted to F.T.C. during its antitrust inquiry into a firm's merger activities, court held that material was properly withheld by agency since disclosure of document would have caused considerable injury to those companies who had supplied the information. It was not necessary to obtain affidavits from company officials providing the information since F.T.C.'s affidavit, together with its document index and the court's random sampling of the information sufficiently established the exemption.

John D. Taurman, Washington, D.C., for plaintiff.
Robert M. Werdig, Washington, D.C., for defendant.
Before FLANNERY, *District Judge*.

MEMORANDUM

The court has reviewed the Further Supplemental Justification for Withholding Documents filed by the defendant Federal Trade Commission. It appears that only the following documents, listed by Index page and item number, remain in contention: 77,3; 77,4; 78,1; 78,3 through 78,5; 79,2 through 79,4; and all items at pages 84 through 86 of the Commission's Index of Documents Withheld, with the exception of 85,3; 85,4; and 85,6. The court has determined that Exemption 4 of the Freedom of Information Act (5 U. S. C. § 552(b)(4) justifies non-disclosure of all the above-listed documents at pages 77 through 79 of the Index. Primarily in the affidavit of Paul T. Breitstein, an FTC staff attorney supporting the complaint in Docket No. 8989, accompanying the Further Supplemental Justification, the defendant has established that the documents contain non-segregable confidential commercial and financial information that was supplied to the Commission during its antitrust investigation of Gifford-Hill's merger activities. For example, the Breitstein affidavit recites the request of a ready mix concrete manufacturer within document 77,3 at page 3: "We request that this letter and all of its contents be given confidential status and that if any part or the whole be offered as evidence that we be notified so that we could request *in camera* treatment." This request can be related to documents 77,3, 77,4 78,1 and 78,3, which all were supplied by the same manufacturer. Further, a

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶60,859 at 68,766 (1976–1 Trade Cases).

random review of the documents by the court indicates generally that disclosure would, in fact, cause substantial harm to the competitive positions of the companies from whom the information was obtained. See *National Parks and Conservation Ass'n* v. *Morton* 498 F.2d 765, 770 (D.C. Cir. 1974). The affidavit corroborates this conclusion with respect to the documents remaining in contention under Exemption 4, and warrants a final determination that the documents should not be disclosed to the plaintiff.

The court did consider requiring affidavits from those company officers who supplied the information to the Commission to substantiate the Commission's claims under Exemption 4. However, this course was determined to be unnecessary for two reasons. First, in a case where the suppliers of confidential information were many times more numerous than is the case here, obtaining affidavits would be unreasonably burdensome if the court were otherwise persuaded that the standards for withholding under Exemption 4 had been met. Second, and more importantly, the Commission's affidavit sufficiently particularizes the reasons supporting the Commission's assertion of the confidential and sensitive nature of the information withheld. Together with the Index of Documents Withheld, the affidavit offers a substantial basis to conclude that the documents at issue should not be within the public domain, and thus satisfies the Commission's burden to justify non-disclosure. See *Pacific Architects and Engineers* v. *Renegotiation Board*, 505 F. 2d 383, 385 (D. C. Cir. 1974).

The portions of the documents still in contention at pages 84 through 86 of the Index have been properly withheld under Exemption 7D of FOIA. Representations of intended confidential treatment made in the Breitstein affidavit, and a random review by the court of the source material which has been disclosed make it clear that protection of the confidences of the sources is preferable to disclosure under the Act. Exemption 7D is but one element in the broader exemption safeguarding an agency's investigative function. Disclosure of the sources at issue would unduly interfere with the Commission's investigative processes and would undermine its ability to pursue similar investigations in the future in the public interest.

Finally, four documents that had been missing from the previous *in camera* submission pursuant to the Order of November 25, 1975 were submitted to the court for *in camera* review. The documents are identified as follows: 12,1; 14,6; 18,5; and 27,1. These documents, reflecting internal thought and decisionmaking processes of the Commission were properly withheld under Exemption 5 of the Act, 5 U. S. C. § 552(b)(5).

ITT CONTINENTAL BAKING COMPANY, INC. v. FEDERAL TRADE COMMISSION*

TED BATES & COMPANY, INC. v. FEDERAL TRADE COMMISSION*

No. 356, Docket 75-4141. F.T.C. Docket No. 8860.

(United States Court of Appeals, Second Circuit, March 1, 1976)

1. DECISION THAT ADVERTISEMENTS WERE ONLY DECEPTIVE AND NOT UNFAIR WAS NOT PREJUDICIAL TO PETITIONERS WHERE THEY WERE APPRISED OF ISSUES AT STAKE AND LITIGATED ISSUES IN F.T.C. PROCEEDING.

[208] Petitioners, which were charged with exploiting children's aspirations through certain television advertisements, which were apprised of issues actually at stake in proceeding before Federal Trade Commission and which in fact litigated issues throughout proceeding, were not prejudiced by Commission's decision that challenged advertisements were only deceptive and not unfair as well.

2. PETITIONERS' RIGHT TO ADEQUATE NOTICE WAS NOT VIOLATED WHERE F.T.C. CONSIDERED ADVERTISINGS' EFFECT ON ADULTS AS EVIDENCE OF ITS EFFECT ON CHILDREN.

Where, following Federal Trade Commission's conclusion that challenged advertising had capacity to deceive adults as well as children although both sides had treated complaint as charging only deception of children on issue in question, there was no persuasive reason to disbelieve Commission's explanation on reconsideration that violation underlying order involved misrepresentation to children and that effect of advertising on adults was considered only as evidence of advertising's effect on children, Commission's order did not violate petitioner's right to adequate notice.

3. REFERENCE TO ADVERTISING'S CAPACITY TO DECEIVE ADULTS WAS NOT UNFAIR WHERE IT WAS USED TO SUPPORT FINDING THAT IT WAS DECEPTIVE TO CHILDREN.

In view of, inter alia, Federal Trade Commission's primary reliance on its own expertise in interpreting challenged advertisements, there was no real unfairness in Commission's reference to capacity of challenged advertisements to deceive adults in support of its finding that advertisements were deceptive to children in connection with complaint that had been treated as charging only deception of children.

4. F.T.C. DID NOT ERR IN FINDING CHALLENGED ADVERTISEMENTS MISLEADING TO CHILDREN WHERE COMMERCIAL CONTENT AND BROADCAST SCHEDULING SUPPORTED FINDING.

Where, inter alia, Federal Trade Commission's conclusion that challenged commercials portrayed product as extraordinary food for producing dramatic growth in children was substantially supported by content of commercials which contained numerous pictorial and verbal suggestions of important casual relation-

* Reported in 532 F.2d 207 (1976). For case before the Commission, see 83 F.T.C. 865; *modified* 83 F.T.C. 1105.

ships between consumption of product and growth in children, and such advertisements were shown on daytime television with children constituting substantial part of viewing audience. Commission did not err in making finding that presentations were misleading to children in violation of Federal Trade Commission Act.

5. F.T.C.'S FAILURE TO EXPLICITLY DISCUSS A.L.J.'S FINDINGS DID NOT RENDER ITS DECISION-MAKING FATALLY DEFECTIVE WHERE A.L.J.'S FINDINGS WERE CONSISTENT WITH F.T.C.'S VIEWS.

Where findings of Administrative Law Judge were for the most part consistent with Federal Trade Commission's view of challenged television commercials, Commission examined and considered record developed at initial hearing, and Commission provided explanation as to only finding which directly contradicted Commission's decision. Commission's failure explicitly to discuss Administrative Law Judge's findings did not render its decision making fatally defective.

6. BY DELETING PORTIONS OF ORDER LACKING REASONABLE RELATIONSHIP TO OFFENDING CONDUCT, COURTS MAY NARROW F.T.C. ORDERS.

Although Federal Trade Commission has wide discretion in its choice of remedies to cope with unlawful practices disclosed by the record and so long as remedial order is reasonably related to unlawful practices found to exist, Commission's order should be upheld, court may narrow Commission orders by deleting those portions for which reasonable relationship to offending conduct is lacking.

7. EXONERATION OF PETITIONERS RESPECTIVE TO ELEVEN OF TWELVE ALLEGATIONS DID NOT PRECLUDE PRESCRIPTION OF BROAD CEASE AND DESIST ORDER BUT WAS A FACTOR IN WEIGHING REASONABLENESS OF ORDER.

Although as a general rule failure of complaint counsel to prove all of charges originally brought should not necessarily preclude Federal Trade Commission from prescribing broad cease and desist order on [209] basis of violations which it does find, exoneration of petitioners with respect to 11 out of 12 charged nutritional misrepresentations was at least a factor to be weighed in judging reasonableness of order extensively regulating petitioners' advertising of nutritional qualities in food.

8. ORDER RESTRICTING NUTRITIONAL REPRESENTATIONS OF "ANY" FOODS WAS UNREASONABLE WHERE F.T.C. SPECIFICALLY FOUND PRODUCT HAD NOT BEEN MISREPRESENTED AS NUTRITIONALLY SUPERIOR OR NECESSARY FOR GROWTH AND DEVELOPMENT.

Where Federal Trade Commission specifically found that product had not been misrepresented as nutritionally superior or as necessary for children's healthy growth and development, cease and desist order which imposed restriction on petitioners concerning representations of nutritional properties of any food did not appear to be reasonably calculated to prevent future violations of sort found to have been committed and was not reasonably related to Commission's finding that product was misrepresented as extraordinary food for producing dramatic growth in children.

9. VOLUNTARY CESSATION OF PRACTICES DOES NOT BAR F.T.C. ORDER.

Voluntary cessation of illegal practice is not bar to Federal Trade Commission's cease and desist order.

10. ORDER RESTRICTING REPRESENTATION OF FUNCTIONAL VALUE OF FOOD

PRODUCT THROUGH VISUAL TECHNIQUES WAS OVERLY BROAD ON BASIS OF FINDINGS.

Federal Trade Commission's cease and desist order which imposed restrictions on petitioners concerning representation of functional value or any other attribute of any food product to user through use of demonstrations or other visual techniques did not bear reasonable relationship to finding that, in conjunction with other elements of challenged advertisements, particular and highly exaggerated sequence conveyed false impression about capacity of product to produce growth in children and was too broad to be sustained on basis of Commission's findings.

11. EXONERATION OF ALL BUT ONE CHARGE OF MISREPRESENTATION OF NUTRITIONAL CHARACTERISTICS OF FOOD RENDERED PORTION OF ORDER TOO BROAD TO BE SUSTAINED.

Where petitioners were exonerated of charges that they had made other sorts of nutritional misrepresentations than single one found to have been committed, portion of cease and desist order which proscribed misrepresenting nutritional characteristics of food in any manner was too broad to be sustained.

12. EXTENSION OF ORDER TO COVER ADVERTISING OF ANY FOOD PRODUCT WAS WITHIN F.T.C.'S DISCRETION WHERE PETITIONERS WERE FOUND TO HAVE MISREPRESENTED GROWTH PROPERTIES OF PARTICULAR FOOD PRODUCT IN TWO AD CAMPAIGNS FOR A NUMBER OF YEARS.

Where petitioners had been found to have misrepresented growth properties of food product in numerous advertisements comprising two large campaigns over a number of years, extension of cease and desist order to cover advertising of any food product was within discretion of Federal Trade Commission since misrepresenting growth properties was particular type of deceptive practice which petitioners could equally well use in advertising other food products.

13. WHEN FORMULATING CEASE AND DESIST ORDERS IN OTHER PROCEEDINGS, F.T.C. MAY NOT RELY ON CONSENT ORDERS AS EVIDENCE OF ADDITIONAL ILLEGAL CONDUCT.

Federal Trade Commission may not rely on consent orders which provide that they do not constitute admission that law has been violated as evidence of additional illegal conduct when formulating cease and desist orders in other proceedings.

14. ORDER TO CEASE AND DESIST REQUIRING ADVERTISED FOOD TO BE CAPABLE OF MEETING THE ADVERTISED CHARACTERISTICS WAS REASONABLY RELATED TO F.T.C. FINDINGS.

Federal Trade Commission cease and desist order, which was not limited to representations concerning "dramatic growth" but also covered representations that food products contribute to "proper" growth or provide "substantial benefits" for such growth, and which required that any food so advertised be capable in fact of significantly contributing to growth "by itself," was reasonably related to Commission's finding that challenged television advertisements represented to viewers that product was extraordinary food for producing dramatic growth in children.

15. F.T.C. WAS JUSTIFIED DIRECTING ORDER AGAINST GENERAL ADVERTISING PRACTICES WHERE EVIDENCE SUPPORTED FINDING THAT ADVERTISING WAS NOT ALTOGETHER SUCCESSFUL IN FOCUSING ON ONLY THE TARGET GROUP.

Where advertising found misleading to children was not restricted to

commercials shown on children's programs, and there was evidence that advertisers were not particularly successful in focusing their "impressions" only on target group of viewers, Federal Trade Commission, based on finding that challenged television advertisements represented to viewers that product was extraordinary food for producing dra[210]matic growth in children, was justified in directing cease and desist order against petitioners' advertising in general.

16. ORDER WAS MODIFIED BY CLAUSE GIVING AD AGENCY DEFENSE THAT IT WOULD BE LIABLE FOR FUTURE VIOLATIONS ONLY WHERE IT "KNEW OR HAD REASON TO KNOW" OF ADVERTISING'S FALSITY.

Where Federal Trade Commission had no objection to inclusion of clause giving advertising agency defense that it would be liable for future violations of cease and desist order only if it "knew or had reason to know" of advertisement's falsity, and there appeared to be no reason why such a clause would be inappropriate, cease and desist order was modified by addition of such clause.

(Syllabus with substituted caption taken from 532 F.2d 207.)

On motion for review of F.T.C. cease and desist order, court held that there was no violation of petitioners' right to adequate notice; reference to capacity of challenged advertisements to deceive adults in support of finding that the advertising was deceptive to children was not really unfair; portions of order were not reasonably related to finding that product was misrepresented as extraordinary food for producing dramatic growth in children, but F.T.C. did not err in finding that representations were misleading to children.

Enforcement of order as modified granted.

John H. Schafer, III, Washington, D.C. (*Lawrence M. McKenna,* New York City, *Stephen C. Rogers,* Washington, D.C., and *Gordon A. Thomas,* Rye, N.Y., on the brief), for petitioner Itt Continental Baking Co., Inc.

Marshall Cox, Washington, D.C. (*Donald J. Mulvihill, Laurence T. Sorkin, Cahill, Gordon & Reindel,* Washington, D.C., and *Elhanan C. Stone,* New York City, on the brief), for petitioner Ted Bates & Co., Inc.

Denis E. Hynes, Washington, D.C. (*Robert J. Lewis,* Gen. Counsel, *Gerald Harwood,* Assistant Gen. Counsel, and *James P. Timony,* Washington, D.C., on the brief), for respondent Federal Trade Commission.

Donovan, Leisure, Newton & Irvine, Mahlon F. Perkins, Jr., and *Thomas R. Trowbridge, III,* New York City, on the brief, for American Association of Advertising Agencies, Inc. as *amicus curiae.*

Before Anderson, Feinberg and Mulligan, *Circuit Judges.*

ROBERT P. ANDERSON, *Circuit Judge:*

These are petitions to review an order of the Federal Trade Commission (Commission or FTC) requiring that the petitioners, ITT Continental Baking Co., Inc. (ITT Continental) and Ted Bates &

Company, Inc. (Bates), cease and desist from making various types of nutritional claims in advertising food products.[1] The cease and desist order was predicated on the Commission's finding that, in a series of advertisements, ITT Continental and Bates, its advertising agency, violated §§ 5 and 12 of the Federal Trade Commission Act by falsely representing ITT Continental's product, "Wonder Bread", to be "an extraordinary food for producing dramatic growth in children." The petitioners claim that the Commission's finding of a violation was both procedurally defective and unsupported by the record. They also claim that, even on the basis of the finding itself, the Commission's cease and desist order is too broad and vague to be sustained.[2] For the reasons hereinafter stated, we affirm the Commission's order as to the violation found but modify the cease and desist portions thereof.

I.

Although there is evidence that American consumers do not pay much attention to nutritional content when purchasing bread,[3] for many years the advertisers of Wonder Bread apparently operated on the contrary assumption; and petitioner Bates used the nutritional qualities of Wonder Bread as that product's "unique selling proposition"[4] in the advertisements it helped develop for ITT Continental. In particular, the petitioners ran two advertising campaigns em[211]phasizing Wonder Bread's nutritional value which formed part of the basis for the FTC proceedings here reviewed. The first, referred to as the "Wonder Years" campaign, took place between 1964 and 1970, and featured, *inter alia*, television[5] commercials referring to the "Wonder Years—ages one through twelve—when your child actually grows to ninety percent of his adult height" and enumerating the "vital elements" found in Wonder Bread "for growing minds and bodies."[6] The second campaign, which ran in 1970 and 1971, involved

[1] These petitions, originally filed in this court but transferred to the Court of Appeals for the District of Columbia Circuit because of a prior filing in that Court of a petition to review the same FTC order, have been re-transferred here following dismissal of the prior petition. *Consumer Federation of America* v. *FTC*, 169 U.S. App.D.C. 136, 515 F.2d 367 (1975).

[2] Petitioner Bates also objects to the absence of a "knew or had reason to know" clause in the order against it, see *infra*.

[3] ITT Continental's vice president in charge of marketing and advertising testified in the FTC proceedings about various studies which so indicated.

[4] "A unique selling proposition is an advertising claim concerning a product which is thought to be strong enough to cause customers to buy the product about which the claim is made rather than a rival product. To be unique the proposition must be one that the competition either cannot, or does not, offer." Stipulation of the parties, before the FTC, Commission Exhibit 174.

[5] The campaigns also included advertisements on radio and in newspapers and magazines.

[6] A typical commercial from this campaign was described by the Commission as follows:

"[Petitioners'] 60-second commercial entitled 'Cardboard House' * * * depicts several young children playing in a cardboard house. The commercial opens with the announcer stating:

These are the 'Wonder Years,' the formative years one through twelve when your child develops in many ways, actually grows to 90% of her adult height.

* * * * * * *

(Continued)

the so-called "How Big" commercials, which typically portrayed responses of several children to the question, "How big do you want to be?"—*e.g.*, "Big enough to ride a two-wheeler"—and suggested that the viewer could help "by serving nutritious Wonder Bread."[7] The television commercials in both campaigns generally contained what the petitioners refer to as a "fantasy growth sequence," a visual insert in which, "through some unexplained filming technique," a small child is shown growing to the size of a 12-year-old in a few seconds.

The above-described advertisements were aimed mainly at women between 18 and 49 years of age with children below the age of 18,[8] but "substantial numbers" of children [212] were stipulated to be in the viewing audience as well.[9] In addition, the petitioners presented on children's television programs advertisements for Wonder Bread which were specifically directed at children. For example, on the "Captain Kangaroo" show, the host was portrayed discussing with "Mr. Moose" the latter's goals concerning physical growth, and, while conceding that Wonder Bread would not cause Mr. Moose to grow *"quite* as big as a tree," the Captain asserted that "Wonder *does* help boys and girls grow up big and strong * * *."[10] These commercials did not contain the so-called fantasy growth sequence.

To help make the most of these 'Wonder Years,' serve nutritious Wonder Enriched Bread. Wonder helps build strong bodies 12 ways. Carefully enriched with foods for body and mind. Wonder Bread tastes so good, and it is so good for growing child, for active adult.

While the announcer is talking, the TV screen shows a child eating Wonder Bread and then actually growing rapidly from a very young child to a twelve-year old. While this visual rapid growth is taking place before the viewer's eyes, first the word 'protein,' then 'mineral,' then 'carbohydrates,' and finally 'vitamins,' are flashed in rapid succession above the growing child, each one coinciding with each growth sequence depicted. This visual depiction of the child growing while eating Wonder Bread appears twice in the 60-second commercial. When it appears the second time, the announcer asserts that 'each slice of bread supplies protein for muscle, minerals for strong bones and teeth, carbohydrates for energy, vitamins for nerves, all vital elements for growing minds and bodies.' The commercial ends with the announcer urging parents:

> to help make the most of her 'Wonder years,' her growth years, serve Wonder Bread. Wonder helps build strong bodies 12 ways."

Opinion of Commission, at 5–6 (ellipsis in original; footnote omitted).

[7] The Commission and the Administrative Law Judge described several of the commercials from this campaign as follows:

> "These commercials open showing a young child with 'HOW BIG DO YOU WANT TO BE?' over-printed. The announcer says, 'Wonder asks, how big do you want to be?' Various children answer as they are photographed: 'Big enough so that the barber won't have to cut my hair in a baby's chair,' 'Big enough to be a cheerleader,' 'Big enough to sink a basket,' 'Big enough to touch the ceiling myself,' 'Big enough to dance with my girlfriend,' 'Big enough to go surfing,' 'Big enough to wear my daddy's shoes,' 'Big enough to see the parade,' 'Big enough to ride a two-wheeler,' 'About ten times bigger than my sister,' 'Big enough to reach things without a chair,' and 'Bigger than George, he's my dog.'
>
> After the children have told how big they want to be, the announcer states:
>
> He'll never need Wonder Bread more than right now, because the time to grow bigger and stronger is during the Wonder Years—ages one through twelve—the years when your child grows to ninety percent of his adult height.
>
> During this audio message, the same Wonder Years visual growth sequence is used* * *"

Opinion of Commission, at 6–8 (footnote omitted.)

[8] Counsel for the Commission in their brief contend that the commercials were shown on children's programs as well but the Commission's opinion was to the contrary as it is supported by evidence in the record.

[9] There was testimony that up to 26% of the Wonder Bread television "impressions" were received by children, as compared with 26% going to women between 18 and 49 years of age.

[10] The following audio sequence is typical of the commercials shown on the Captain Kangaroo show:

(Continued)

On August 24, 1971, the FTC issued a complaint against the petitioners alleging that their Wonder Bread advertisements were false, misleading, deceptive, and unfair in several different respects. The complaint also contained allegations relating to advertisements for another group of ITT Continental's products, "Hostess Snack Cakes," which allegations were ultimately dismissed and are irrelevant for purposes of this review except possibly insofar as the fact of their dismissal bears on the reasonableness of the Commission's cease and desist order, to be considered *infra*. The crucial allegations concerning Wonder Bread were contained in paragraphs eight, ten, and eleven of the complaint. Paragraph eight charged that the petitioners had represented, "directly and by implication," that:

(a) * * * Wonder Bread is an outstanding source of nutrients, distinct from other enriched breads.

(b) Consuming * * * Wonder Bread in the customary manner that bread is used in the diet will provide a child age one to twelve with all the nutrients, in recommended quantities, that are essential to healthy growth and development.

(c) Parents can rely on Wonder Bread to provide their children with all nutrients that are essential to healthy growth and development.

(d) The optimum contribution a parent can make to his child's nutrition during the formative years of growth is to assure that the child consumes Wonder Bread regularly.

(e) The protein supplied by said Wonder Bread is complete protein of high nutritional quality necessary to assure maximum growth and development.

Paragraph ten alleged:

Certain of the [Wonder Bread] advertisements are addressed primarily to children or to general audiences which include substantial numbers of children, which advertisements tend to exploit the aspirations of children for rapid and healthy growth and development by falsely portraying, directly and by implication, * * * Wonder Bread as an extraordinary food for producing dramatic growth in children.

. . . . . .

Paragraph eleven alleged:

Certain of the [Wonder Bread] advertisements are addressed primarily to parents of

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"Captain Kangaroo: Mr. Moose, I have an interesting question for you. If you could be as big as you wanted to be * * * how big would you want to be?

Mr. Moose: Gee * * * as big * * * as big * * * I know. As big as a tree. Then I could see *everything* around me for miles and miles.

Captain Kangaroo: Wouldn't that be fun, Mr. Moose.

Mr. Moose: Yes. Do you think eating Wonder Bread would get me that big?

Captain Kangaroo: Well * * * not *quite* as big as a tree * * * but Wonder *does* help boys and girls grow up big and strong, and give them energy for work and play. Each slice of Wonder is baked with vitamins and other good things that help you grow.

. . . . . .

Opinion of Commission, at 8–9 (footnote ommitted).

Similar advertisements were also shown on "Bozo Circus," another children's program broadcast in Chicago.

children or are addressed to gen[213]eral audiences which include substantial numbers of parents of children, which advertisements tend to exploit the emotional concern of such parents for the healthy physical and mental growth and development of their children by falsely portraying, directly and by implication, Wonder Bread as a necessary food for their children to grow and develop to the fullest extent during the preadolescent years.

* * * * * * *

For the most part the petitioners admitted that Wonder Bread did not have the nutritional qualities alleged to have been claimed for it in the challenged advertisements, but they denied that the advertisements represented that the bread did have those qualities. The case turned, therefore, on the meaning of the Wonder Bread advertisements themselves. In his opening remarks to the Administrative Law Judge before whom the case was initially tried, the Commission's complaint counsel announced that primary reliance would be placed on the Commission's own expertise in interpreting what advertising says or implies, but that expert testimony and documentary evidence would also be presented on the question of people's actual perception of the challenged commercials. In the evidence introduced by complaint counsel were the results of several surveys of consumer attitudes toward Wonder Bread and other brands of bread, including one series of inquiries which attempted directly to measure the effect of some of the challenged advertisements on consumers and which also elicited "verbatim responses" as to their recollections of the content and message of particular Wonder Bread commercials.[11] Experts for both sides testified as to their analyses of one or more of the studies in question; in addition both sides presented expert opinions on how viewers would perceive the challenged advertisements.

Although some of the evidence indicated that to a limited extent consumers tend to view Wonder Bread comparatively favorably on general nutritional grounds, and that some of the Wonder Bread commercials increased the product's nutritional rating among the viewers interviewed, the Administrative Law Judge found that no significant proportion of consumers understood the Wonder Bread advertisements as making any of the specific claims alleged in paragraph eight of the complaint, that any positive impact of the advertisements on viewers' attitudes had not been shown to result from nutritional claims as distinguished from a general "halo effect"[12]

[11] In general, these studies were not conducted on behalf of the Commission but had been performed for ITT Continental for purposes not related to this litigation.

[12] According to the Commission, "[The] halo phenomenon in essence can be defined as a general aura of superiority ascribed by consumers to a specific product or product attribute which is generated not by a particular claim in an advertisement about that product or product attribute but merely by either the fact that the product was widely used by consumers or by the fact that the advertisements made only generalized claims about the product itself or stressed an entirely different attribute." Opinion of the Commission, at 13.

unrelated to nutrition, and that the challenged advertising did not in fact contain, either directly or by implication, any of the representations alleged. On appeal to the full Commission, it concluded that the evidence, at best "ambiguous" as to the subparagraph (a) allegation, did not demonstrate that the petitioners had made the specific nutritional representations alleged in paragraph eight. Both the Administrative Law Judge and the Commission also concluded that there was no proof that the advertisements had represented (as alleged in paragraph eleven) that Wonder Bread is a *necessary* food for the healthy growth of children.

With respect to the paragraph ten allegation, involving the portrayal of Wonder Bread as "an extraordinary food for producing dramatic growth in children," complaint counsel introduced, in addition to the Wonder Bread advertisements themselves, testimony by two psychiatrists and a pediatrician concerning how children perceive **[214]** and react to television commercials. These experts testified that, while a child's perception of such commercials is influenced by his parents and other external factors, children below the age of seven would generally tend to accept the "fantasy growth sequence" in Wonder Bread advertising as literal truth: *i. e.*, they would believe that eating Wonder Bread could cause them to grow on the spot. Normal older children, between six and twelve years of age, would be more skeptical of the fantasy growth sequence and would generally reject it as a literal representation of reality, but such children would still tend to accept statements in the advertisements about the product's nutritional value and to believe that Wonder Bread has some special capacity to enhance growth. Complaint counsel witnesses also testified that the commercials shown specifically on children's programs (which lacked the fantasy growth sequence) would be particularly effective with child viewers because the commercial message was delivered by trusted figures and without a clear distinction between the content of the programs themselves and the advertisements. As for the psychological impact of the commercials, one witness testified that a young child might feel that something was wrong with him upon discovering that, unlike those in the fantasy growth sequence, he did not suddenly grow larger and taller after eating Wonder Bread. Children, especially between six and twelve, could also react by becoming mistrustful of information from adult sources. Another witness testified that some young children would be "temporarily burdened" by the puzzling portrayal of instantaneous growth.

A psychiatrist appearing on behalf of the petitioners emphasized the importance of family and other influences on children's perception of television commercials. He testified that, while a normal young child viewing the fantasy growth sequence might "hope that maybe this

would happen to him", discovering that he would not in fact grow instantaneously by eating Wonder Bread would be a normal learning experience without harmful impact.

The Administrative Law Judge found, *inter alia*, that although some young children may perceive the fantasy growth sequence as literally true, others are skeptical; that the fantasy element in Wonder Bread commercials is "a diluted version of most normal children's fantasies" and that television contains numerous other instances of "fantastic or magical appeals"; that whether a child asks his parents to purchase an advertised product "depends more on the nature of the parent-child relationship and other factors than on the persuasiveness of the commercial to the child"; that the Wonder Bread commercials presented on children's programs contained no portrayal of Wonder Bread as an extraordinary food for producing dramatic growth; and that there was no proof of any psychological damage to children from the advertising.

The Judge concluded that complaint counsel had failed to prove any of the allegations of false, misleading, and deceptive claims, and he dismissed the complaint in its entirety.

The Commission rejected the Administrative Law Judge's conclusion concerning paragraph ten of the complaint. It found instead that "[t]he challenged Wonder Bread television advertisements represent to viewers that Wonder Bread is an extraordinary food for producing dramatic growth in children." The Commission relied principally on its interpretation of the advertisements themselves "when viewed in their entirety." It pointed to the verbal content of the commercials, which included numerous references to growth in children and the value of Wonder Bread in aiding such growth, as well as to the visual fantasy growth sequence. The Commission stated that "the inferences to be drawn from the sequence, and others, is clearly misleading, apart from whether or not most consumers would regard the literal import of the sequence with skepticism." It also concluded that the other evidence in the record was not inconsistent with its view of the challenged advertisements: experts had testified that the commercials could be perceived as representing Wonder Bread as an [215] extraordinary food for producing growth in children, and survey data indicated that the consumers believed Wonder Bread to be superior or exceptional in terms of helping children grow.

Since the Commission also found that in fact Wonder Bread is not an extraordinary food for producing growth in children, it concluded that the challenged advertisements were false and misleading, in violation of §§ 5 and 12 of the Federal Trade Commission Act. It declined, however, to find that the false representations additionally constituted an *unfair* act under § 5 on the theory that they exploited the

aspirations of children and injured them psychologically. In the view of the majority of the Commission, any alleged injury in this case was inseparable from the falseness of the representations in question.

After the Commission handed down its opinion and order of October 19, 1973, the petitioners filed a request for reconsideration on the ground, *inter alia*, that the FTC had found a violation of the Federal Trade Commission Act on a theory which had never been alleged or advanced in the litigation, namely, that the challenged advertisements made the false growth representations not only to children but to *adults* as well. In its order responding to the petition for reconsideration, the Commission conceded that its earlier opinion had discussed the effects of the Wonder Bread commercials on adults as well as children, but it did not view that as inconsistent with the charge in paragraph ten, the thrust of which the Commission agreed was "directed to the effect of the challenged advertisements on children." It pointed out that the commercials considered in its opinion were those which were shown either on children's programs or on programs viewed by substantial numbers of children. According to the Commission, evidence that

> * * * the advertisements had the capacity to lead parents * * * to believe that Wonder Bread is an extraordinary food for producing dramatic growth in children * * * was clearly probative on the issue raised in paragraph 10, since it is reasonable to assume that advertisements which have the capacity to deceive the more sophisticated adult portion of a viewing audience would a *fortiori* have the capacity to deceive the children in that audience. We find no error in relying upon this evidence and making the findings which we did.

II.

In their petition for review by this Court, ITT Continental and Bates argue that in finding a violation under paragraph ten of the complaint, the Commission deprived them of the notice and opportunity to be heard which are required by the Administrative Procedure Act[13] as well as constitutional due process. They point to such cases as *Stanley Works* v. *FTC*, 469 F.2d 498, 508 n. 24 (2 Cir. 1972), *cert. denied*, 412 U.S. 928, 93 S.Ct 2750, 37 L.Ed.2d 155 (1973); *Bendix Corp.* v. *FTC*, 450 F.2d 534, 542 (6 Cir. 1971); and *Rodale Press, Inc.* v. *FTC*, 132 U.S.App.D.C. 317, 407 F.2d 1252 (1968), for the rule that "an agency may not change theories in midstream without giving respondents reasonable notice of the change." *Rodale Press*, *supra*, at 1256.

[1] One aspect of the petitioners' claim on this point is that, while paragraph ten alleged exploitation of children's aspirations for rapid

[13] Section 5 of the Act, 5 U.S.C. § 554, provides, in part, that "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * * Persons entitled to notice of an agency hearing shall be timely informed of * * * the matters of fact and law asserted. * * *"

growth by falsely portraying the growth properties of Wonder Bread, the Commission did not consider the exploitation issue and found a violation merely on the basis of false representation. To the extent that this finding may constitute a variance with the pleadings,[14] it will none[216]theless be sustained because the parties charged were apprised of the issues actually at stake and in fact litigated them throughout the proceedings. *E. g., NLRB* v. *Mackey Radio & Telegraph Co.*, 304 U.S. 333, 349–51, 58 S.Ct. 904, 912–13, 82 L.Ed. 1381–1392–93 (1938); *National Realty & Construction Co., Inc.* v. *Occupational Safety & Health Review Commission*, 160 U.S.App. D.C. 133, 489 F.2d 1257, 1264 (1973); *Golden Grain Macaroni Co.* v. *FTC*, 472 F.2d 882 (9 Cir. 1972), *cert. denied*, 412 U.S. 918, 93 S.Ct. 2730, 37 L.Ed.2d 144 (1973); *Swift & Co.* v. *United States*, 393 F.2d 247 (7 Cir. 1968); *Curtiss-Wright Corp., Wright Aeronautical Division* v. *NLRB*, 347 F.2d 61, 72–74 (3 Cir. 1965); *NLRB* v. *Johnson, Trustee*, 322 F.2d 216, 220 (6 Cir. 1963), *cert. denied*, 376 U.S. 951, 84 S.Ct. 968, 11 L.Ed.2d 971 (1964); *Armand Co.* v. *FTC*, 84 F.2d 973 (2 Cir.), *cert. denied*, 299 U.S. 597, 57 S.Ct. 189, 81 L.Ed. 440 (1936). The petitioners were not prejudiced by the Commission's decision to find that the challenged advertisements were only deceptive and not unfair as well.

[2] A more serious question is raised by the petitioners' claim that the Commission erred by making a finding that the Wonder Bread advertisements were deceptive to "viewers" in general, despite the fact that during the FTC litigation both sides treated paragraph ten of the complaint as charging deception of children only. There is little doubt that the parties did so understand and litigate the charge, and the Commission does not argue otherwise. Similarly, it cannot be disputed that the Commission did in fact conclude that the Wonder Bread advertisements "had the capacity to deceive * * * parents" and not just children. The petitioners contend that they were prejudiced by the FTC's action because had they known that paragraph ten would be interpreted as charging deception of adults, they would have introduced expert testimony concerning the probable perception of the advertising by adults as well as an analysis of the survey evidence to refute the Commission's interpretation of it.

It should be borne in mind, of course, that the Commission did find the challenged advertisements to be deceptive to children, as alleged in paragraph ten. Were it not for the fact that the cease and desist order might have been based, in whole or in part, on a finding by the

[14] The violation found would at worst appear to be the civil equivalent of a "lesser included offense" in relation to the paragraph ten allegation, since a false portrayal of Wonder Bread was literally alleged therein, along with an exploitation of children.

Commission of an additional or broader violation of the law than that alleged in paragraph ten,[15] there would be little reason to treat the challenged portions of its opinion as more than harmless surplusage.[16] By itself, the Commission's initial opinion is sufficiently ambiguous in this respect that we might have found it necessary to remand so as to ensure that the cease and desist order was based only on the "matters of fact and law asserted" and in order to afford the petitioners time [217] to litigate the issue. 5 U.S.C. § 554. See *NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854, 861–62 (2 Cir. 1966). But the Commission has already had the question brought to its attention in the petitioners' request for reconsideration, and it has already set out its reasoning on this matter in its order in response thereto. It explained that it *did* view the violation under paragraph ten in terms of the advertisements' effect on *children*, and that it had looked to the evidence of their effect on adults as "probative on the issue raised in paragraph ten," on the assumption that what deceived adults would *a fortiori* deceive children.

The petitioners urge that "the opinion on reconsideration is entitled to no weight on the question presented," contending that it did nothing to remedy the procedural deficiency of the Commission's decision and that its rationale is contradicted by both the initial opinion and other portions of the opinion on reconsideration itself. They point, for example, to the Commission's reference, in the second opinion, to its power to "regulate types of claims that are reasonably related to the past representations and which might constitute alternate roads to the same general goal of deceiving the *public*." (Emphasis added.) But the Commission's use of the term "public" rather than "children" in the context of a general statement concerning the scope of its powers, proves nothing. In any event, youthful television viewers belong to the public as much as adults. Similarly, there is nothing inconsistent with the FTC's later explanation of how it regarded paragraph ten, in the fact that in the initial opinion it considered, and *rejected*, the possibility, urged by complaint counsel, of ordering corrective advertising to benefit "consumers," or in the Commission's reference, on

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[15] In practical terms, it may be doubted that the FTC would reach very different conclusions as to the appropriate remedial action to take on the basis of the deceptiveness to children of a group of advertisements, than it would on the basis of the same type of deceptiveness, in the same advertisements, to children *and* adults. Moreover, given the limited scope of this court's review of FTC cease and desist orders, see *infra*, it is unlikely that an order sustained on the latter basis would not also be sustained on the former. Nevertheless, the petitioners are entitled to a determination of the appropriate remedy by the Commission itself, untainted by the existence of an additional, if similar, finding of a violation against which they had no fair opportunity to defend.

[16] Aside from the terms of the cease and desist order, the petitioners might also justifiably object to the mere entry by the FTC, without adequate notice and opportunity for a hearing, of a finding against them of an additional violation of the Federal Trade Commission Act. The actual finding made in this case, however, —that "[t]he challenged Wonder Bread television advertisements represent to viewers that Wonder Bread is an extraordinary food for producing dramatic growth in children"—states on its face a single type of representation, and the mere fact that the general term "viewers" is used does not require a modification of the finding on fairness grounds. Children are viewers too.

The petitioners further argue that the Commission erred in relying on the advertisements' effect on adults as *evidence* of the effect on children, a contention which we reject, *infra*.

reconsideration, to "the importance to children and consumers of correct nutritional information." While, as appears below, we do not find the cease and desist order to be fully justified by the violation found in this case, we see no persuasive reason to disbelieve the Commission's explanation that, *in its own view*, the violation underlying that order involved misrepresentation to *children*, as the petitioners argue it must. Nothing more is here at issue.[17]

[3] The petitioners next argue, however, that even accepting the FTC's claim that the effect of Wonder Bread advertising on adults was considered only as evidence of its effect on children, reversal would still be required because such use of the evidence constitutes "a legal theory or set of facts which was not presented at the hearing." *National Realty & Construction, supra*, 489 F.2d at 1267 n. 40. But to apply the notice and hearing requirement in this manner in this case would be carrying a good thing too far. To draw a different inference from the evidence in the record than what is urged by the parties, or to find some factual import in the evidence not brought out by them, is not the same thing as relying on evidence not in the record, see *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n*, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937), or basing liability on a legal theory of which the party found liable had no notice, see *Bendix Corp., supra. Cf. Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n. 4, 95 S.Ct. 438, 443, 42 L.Ed.2d 447, 457 (1974). It would be unrealistic to require the Commission to ignore what it viewed as the "inescapable" conclusion that the Wonder Bread advertisements were deceptive to adults, in reaching a determination on the closely related question of whether the advertisements were deceptive to children. Indeed, given the Commission's primary reliance on its own expertise in interpreting advertisements (a reliance shared by complaint counsel and the Administrative Law Judge), it is hard to see how the Commission could have avoided giving some consideration to adults' perception of the challenged commercials. In these circumstanc[218]es, there is no real unfairness in the Commission's reference to the capacity of Wonder Bread advertisements to deceive adults in support of its finding that the advertisements were deceptive to children.

III.

[4] The petitioners attack the FTC's finding of the violation charged by paragraph ten of the complaint as "obviously erroneous." They contend that the finding is logically inconsistent with the Commission's

[17] There is, of course, no inconsistency between the holding here that the Commission did not violate petitioners' right to adequate notice and the holding *infra* that the Commission erred in formulating a cease and desist order which was too broad in relation to the violation found.

dismissal of the allegations that Wonder Bread was represented to be "an outstanding source of nutrients, distinct from other enriched breads" (paragraph 8(a), and a "necessary food for * * * children to grow and develop to the fullest extent * * *" (paragraph eleven). The FTC, however, based its dismissal of paragraph 8(a) on its interpretation of that allegation, favorably to the petitioners, as representing Wonder Bread to be nutritionally superior to *all* other enriched breads, and it was unable to conclude that such a specific misrepresentation was contained in the challenged advertisements. Neither that decision, nor its decision that Wonder Bread had not been represented as *necessary* for a child's growth, is inconsistent with the finding that Wonder Bread was portrayed as an extraordinary food for producing dramatic growth in children. In any event, the petitioners' argument, which rests on the unstated premise that the advertising itself must contain only logically defensible messages, is unpersuasive. Indeed, it is fair to suppose that the commercials in question were *designed* to avoid making any *specific* nutritional misrepresentations while *at the same time* conveying the general idea that Wonder Bread would somehow significantly contribute to growth in children. That the petitioners succeeded in this subtle artifice is no defense to the FTC's order.

While recognizing that the meaning of advertising is ordinarily a matter for the Commission to decide, as long as its conclusions are reasonable, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 386, 85 S.Ct. 1035, 1043, 13 L.Ed.2d 904, 914 (1965), the petitioners further contend that the Commission's finding in this case necessarily attributes to the consumer "not only a careless and imperceptive mind but also a propensity for unbounded flights of fancy,"—a view of consumers which this court has declared itself unwilling to adopt, *FTC* v. *Sterling Drug, Inc.*, 317 F.2d 669, 676 (2 Cir. 1693). Of course, there was expert testimony in the instant proceedings which declared that part of the audience in question, *i.e.* children approximately six years of age and younger, do indeed have such a propensity, and that they would actually tend to perceive commercials containing the "fantasy growth sequence" as promising that Wonder Bread could cause them to grow as suddenly as the child depicted in that sequence. With respect to the Commission's discussion of the effect of the advertising on *adults*, the petitioners' argument might be persuasive only if "dramatic growth," as used in paragraph ten of the complaint, is equated exclusively with the phenomenon of a one-year-old child reaching the size of a twelve-year old, within thirty seconds. It is clear, though, that neither the Commission on appeal nor complaint counsel during the litigation viewed the paragraph ten allegation in such a restricted light.[18]

[18] The Commission specifically stated that it was *not* relying solely on the fantasy growth sequence and that the deceptiveness of that sequence did not depend on consumers accepting it literally.

Although it is unfortunate that the phrase in question was not better defined, as Bates noted in its brief before this court the term " 'extraordinary' is nothing but a vivid adjective," and the same is true of the term "dramatic." The expert testimony introduced by complaint counsel dealt not only with whether children, six years of age or younger, would perceive the fantasy growth sequence as literal fact but also with whether older children, though skeptical of the sequence, would conclude from the advertisements that Wonder Bread has a special ability to aid growth. Similarly, [219] complaint counsel argued before the Commission that the challenged commercials were false and misleading because, *inter alia*, children below the age of six "will tend to perceive * * * the Captain Kangaroo and Bozo ads [excluding the fantasy growth sequence] as promising some special growth capacity * * * and children between the ages of approximately six and twelve will tend to perceive all the challenged television ads as promising a special growth potential which would not be available without eating Wonder Bread * * *". Hence, as developed during the FTC proceedings, the misrepresentation charged in paragraph ten encompassed more than the narrow fantasy portrayal assumed by the petitioners on this review. On the basis of a broader construction of the phrase in question, the Commission's conclusion that the commercials portrayed Wonder Bread as "an extraordinary food for producing dramatic growth in children" is substantially supported by the content of the Wonder Bread commercials themselves, with their numerous pictorial and verbal suggestions of an important causal relationship between the consumption of Wonder Bread and growth in children.[19]

The petitioners also argue that, since the fantasy growth sequence did not appear on commercials shown on children's television programs, the Commission cannot properly find the challenged advertising unlawful on the ground of misrepresentation to *children*. In the petitioners' view, "it simply is not conceivable that * * * advertising intended to reach adults can be judged unlawful simply on the basis of how it may be perceived by some very young children who happen to be in the viewing audience when it is broadcast." Such a general theory would appear to be a novel extension of the existing law, see *In re Kirchner*, 63 F.T.C. 1282, 1290 (1963), *aff'd*, 337 F.2d 751 (9 Cir. 1964). As already indicated, however, the petitioners are wrong in assuming that the advertisements shown on children's television programs were not themselves found to be misleading under paragraph ten despite

[19] The petitioners also take issue with the FTC's reference to expert testimony and survey evidence in support of its conclusion. They point in particular to the example, taken by the Commission from the verbatim responses in one study, see *supra*, of the consumer who declared that one advertisement "tells you Wonder Bread helps your children grow ten feet tall." The petitioners argue that the use of this evidence to demonstrate face-value acceptance of the fantasy growth sequence (by adults) shows the irrationality of the Commission's analysis. But as is clear from its opinion, the Commission did not rely on this or other survey or expert evidence as the basis for its decision under paragraph ten. The decision was reached primarily on the basis of the Commission's own interpretation.

their lack of a fantasy growth sequence, or that only very young children were found to be misled by accepting the sequence at face value in the advertisements which did contain it. Moreover, the latter advertisements were shown on daytime television programs "with *children* constituting a substantial part of the viewing audience," (emphasis in original) and they focused on the benefits of Wonder Bread *to children*, even using, in the "How Big" campaign, portrayals of children expressing their desires for the growth which the commercials implicitly promised would result from consuming Wonder Bread. Under these circumstances the FTC did not err in making the finding that the presentations were misleading to children.

IV.

[5] The final ground on which the petitioners attack the Commission's finding is that, under *Cinderella Career & Finishing Schools, Inc.* v. *FTC*, 138 U.S.App.D.C. 152, 425 F.2d 583 (1970), the Commission is not free to ignore relevant testimony in the record or the findings of the Administrative Law Judge before whom the case was tried. Although the Commission may reach a different conclusion than the latter, it must explain why—a requirement which, the petitioners contend, was not fulfilled here.

While it would have been preferable for the Commission to have commented on the Administrative Law Judge's decision in its discussion of the paragraph ten charge, an examination of his findings on this issue reveals that they contain little which con[220]tradicts the Commission's own analysis. For the most part, the Administrative Law Judge's findings relate to evidence about the perceptions and capacity for "magical thinking" of young children, which was also referred to by the Commission in its opinion and found to be consistent with its view of the challenged commercials. The Administrative Law Judge found that some young children "may perceive the filmed growth sequence in Wonder Bread television commercials as literally true * * *". Others of his findings deal with the extent to which children become skeptical of "television tricks" and magic, but the Commission specifically concluded that skepticism in viewers does not necessarily render the advertisements non-deceptive. The only finding which directly contradicts the Commission's decision is the conclusory statement that the commercials shown on children's programs did not contain the false portrayal of Wonder Bread alleged in paragraph ten, and the Commission provided an explanation of why it viewed these and the other Wonder Bread advertisements as implicitly making the alleged representation. Moreover, unlike *Cinderella, supra*, the Commission in this case did examine and consider the record developed at the initial hearing.

Under these circumstances, we hold that the Commission's failure, explicitly to discuss the Administrative Law Judge's findings regarding paragraph ten, did not render its decision-making fatally defective.

V.

The Commission concluded that the petitioners had made representations concerning Wonder Bread which were false and misleading, and it, therefore, entered a cease and desist order against them which, in relevant part and as modified by the Commission's order on reconsideration, prohibited:

1. [Representing:]
a. The nutritional properties of any [food] product in generalized terms such as "rich in nutrients," vitamins or iron fortified, "enriched," or other similar nutritional references, unless the advertised nutritional value can be substantiated for the average and ordinary use of the product by consumers or by particular groups of consumers provided they are specified.
b. The comparative nutritional efficacy or value of the product without stating the brand, product or product category to which the comparison is being made.
c. The essentiality of the product as a source of a particular nutritional value if there are other food product categories which are also sources of the same or similar nutritional values, and unless the claim can be substantiated for the normal use of the product by consumers or by a particular group of consumers provided that they are specified.
d. The functional value or other attributes of any [food] product to a user through the use of demonstrations or other visual techniques unless the demonstrations are actual depictions of the actual value of the product by actual persons and represent the average and ordinary experience of consumers with the use of the product.
2. [Representing] that any [food] product will contribute to the rapid or proper growth of children by providing dramatic or substantial benefits for such growth or development unless such product, by itself, will in fact make a significant contribution to such rapid or proper growth.
3. [Misrepresenting], in any manner, the nutritional content, efficacy or functional value to the user for the normal use of any [food] product by consumers.

[6] This court has recently had occasion to reaffirm the principle that "the Commission has a wide discretion in its choice of a remedy to 'cope with the unlawful practices' disclosed by the record," *Fedders Corp.* v. *FTC*, 529 F.2d 1398, 1401 (2 Cir. 1976), quoting *FTC* v. *Mandel Bros. Inc.*, 359 U.S. 385, 392, 79 S.Ct. 818, 824, 3 L.Ed.2d 893, 898 (1959), and that "[s]o long as the remedial order is reasonably related to the unlawful practices found to exist, the Commission's order should be upheld." *Fedders*, *supra*, at 1402. The courts may narrow FTC orders, however, by deleting [221] those portions for which a reasonable relationship to the offending conduct is lacking. *Id.* In the present case, the petitioners argue, *inter alia*, that paragraphs (1) and (3) of the cease and desist order are not reasonably related to the Commission's

finding that Wonder Bread was misrepresented as an extraordinary food for producing dramatic growth in children.[20] We agree.

The Commission specifically found that Wonder Bread had *not* been misrepresented as nutritionally superior to other breads, or as necessary for children's healthy growth and development, the very types of representations at which paragraphs 1(b) and 1(c) are aimed. The petitioners had not been charged with representing Wonder Bread's nutritional value in "generalized terms" (the practice regulated by paragraph 1(a)); nevertheless the Commission did *exonerate* them of several accusations concerning Wonder Bread's nutritional content. Moreover, while the petitioners had advertised another group of food products, Hostess Snack Cakes, as "fortified with vitamin and iron," "vitamin fortified," and containing "good nutrition", the Commission *dismissed* all charges relating to this advertising, including charges that the claim of "good nutrition" was misleading. It is difficult to avoid concluding that paragraphs 1(a), (b) and (c) of the cease and desist order were framed to remedy wrongs which the Commission found not to have been committed.

[7] Although as a general rule the failure of complaint counsel to prove all of the charges originally brought should not necessarily preclude the Commission from prescribing a broad cease and desist order on the basis of the violations which it does find, the exoneration of the petitioners with respect to eleven out of twelve nutritional misrepresentations charged by complaint counsel here, is at least a factor to be weighed in judging the reasonableness of an order extensively regulating the advertising of nutritional qualities in food.[21] See *National Dairy Products Corp.* v. *FTC*, 412 F.2d 605, 624 (7 Cir. 1969).

[8] In this case, the restrictions imposed by paragraphs 1(a), (b), and (c) do not appear to be reasonably calculated to prevent future violations of the sort found to have been committed; nor indeed are the practices condemned therein necessarily deceptive in general. As Bates points out, other advertisers are allowed to do what these paragraphs prohibit the petitioners from doing: for instance, the Commission has permitted advertising in which a fruit drink was represented to be "high in Vitamin C" without reference to other products containing

[20] The petitioners also attack portions of these paragraphs as vague, indefinite, and ambiguous. The disposition here of paragraphs 1 and 3 makes it unnecessary to consider these claims.

[21] Paragraph eight of the complaint, dismissed in full, alleged representation of Wonder Bread as: an outstanding source of nutrients; a food which, as customarily used, will provide all the nutrients essential to a child's development; a product which parents can rely on to provide such nutrients; the optimum contribution a parent can make to his child's nutrition; and a source of complete high quality protein. Also dismissed were paragraph eleven, which charged portrayal of Wonder Bread as a necessary food for children's growth; paragraph thirteen, which charged the petitioners with misleading consumers by representing that the fortification of Hostess Snack Cakes was a major nutritional advance and an advance unavailable in other similar products; that Hostess Snack Cakes provide all the vitamins essential for children; and that Hostess Snack Cakes provide children with good nutrition; and paragraph fifteen, which charged false representation of Hostess Snack Cakes as necessary for children's good nutrition.

the vitamin and despite the fact that some other products contain more vitamin C. *Coca-Cola Co.*, 3 CCH Trade Reg. Rep. ¶ 20,470 (FTC 1973). While "those caught violating the Act must expect some fencing in," *FTC* v. *National Lead Co.*, 352 U.S. 419, 431, 77 S.Ct. 502, 510, 1 L.Ed.2d 438, 447 (1957), the particular burdens here are not justified by the mere fact, relied on by the Commission, that the Wonder Bread advertisements found deceptive in one respect contained various references to the product's nutritional qualities.

[9, 10] Paragraph 1(d) appears to present a closer question, since it is directed [222] at the fantasy growth sequence which the Commission viewed as an important feature in the deceptiveness of Wonder Bread commercials. Although some form of order restricting the use of this type of technique might be justified here, paragraph 1(d) is too broad to be sustained on the basis of the Commission's findings.[22] The scope of the phrase "demonstration or other visual technique" is "potentially limitless," *FTC* v. *Colgate-Palmolive Co.*, *supra*, 380 U.S. at 380, 85 S.Ct. at 1090, 13 L.Ed.2d at 911, since every television commercial presenting other than a blank screen involves the use of some sort of "visual technique." This court fails to see how a ban on virtually any sort of televised representation of the value of food products other than "actual depictions of the actual value of the product by actual persons"—irrespective of whether the representation is misleading—bears a reasonable relationship to the finding that, in conjunction with other elements of the challenged advertisements, a particular and highly exaggerated fantasy growth sequence conveyed a false impression about the capacity of Wonder Bread to produce growth in children.

[11] Paragraph 3 of the cease and desist order, which proscribes misrepresenting nutritional characteristics of food "in any manner," suffers from exactly the same defect found fatal in *Country Tweeds, Inc.* v. *FTC*, 326 F.2d 144 (2 Cir. 1964). There the FTC had found that the petitioners had falsely represented that independent laboratory testing showed their cashmere clothing to be superior in durability, and the Commission ordered them, *inter alia*, to refrain from "misrepresenting in any manner the quality of cashmere or other fabric in their merchandise." 326 F.2d at 148. In striking that portion of the cease and desist order, this court stated, "It is difficult to imagine an order couched in more sweeping language than the one now before us." *Id.* at 149. In the present case, as in *Country Tweeds*, the petitioners were

[22] Advertising containing the fantasy growth sequence ended several years ago, and ITT Continental has abandoned nutritional themes in Wonder Bread commercials, with no intention of returning to them, according to its vice president in charge of marketing and advertising. Under these circumstances, particularly in view of the already long duration of this litigation, there is little point in remanding paragraph 1(d) of the order for possible reworking by the Commission. In so acting this court is not unmindful of, but concurs in, the general rule that voluntary cessation of an illegal practice is no bar to a Commission cease and desist order. E. g. *Country Tweeds, Inc.* v. *FTC*, 326 F.2d 144, 148 (2 Cir. 1964).

found to have made one sort of misrepresentation concerning certain product characteristics but were subject to an order covering *any manner* of misrepresentation. The unreasonableness of the order in the present case is underscored by the fact that the petitioners were exonerated of charges that they had made other sorts of nutritional misrepresentations than the single one found to have been committed. See also *Fedders, supra,* where this court observed that the Commission had "done the necessary limitation which reasonableness would require" in limiting the cease and desist order to representations concerning specific types of air conditioner characteristics related to the violation found, "as opposed to the administrative law judge's proscription as to 'any' performance characteristic." At 1403. Accord, *Speigel, Inc.* v. *FTC,* 411 F.2d 481, at 484–85 (7 Cir. 1969).

[12, 13] The petitioners also attack the cease and desist order, including paragraph 2, on several other grounds. They argue that there is no reasonable relationship between the single violation found and the extension of the order to the advertising of *any food product.* The Commission was acting within its discretion, however, in so formulating paragraph 2 of its order. Misrepresenting the growth properties of a food is a particular type of deceptive practice which the petitioners could equally well use in advertising other food products as in advertising Wonder Bread.[23] Unlike the proscriptions contained in the other paragraphs of the Commission's order, the ne[223]cessity or desirability of those contained in paragraph 2 are relatively independent and not called into question by the dismissal of charges that the petitioners had committed *other* types of misrepresentation. Moreover, the use of this practice by the petitioners was not restricted to an isolated instance but was found in numerous advertisements comprising two large campaigns over a number of years. In circumstances no more compelling than these courts have often upheld FTC orders encompassing all products or all products in a broad category, based on violations involving only a single product or group of products; and we do the same here. *Colgate-Palmolive, supra,* 380 U.S. at 394–95, 85 S.Ct. at 1047–48, 13 L.Ed.2d at 919–20; *National Dynamics Corp.* v. *FTC,* 492 F.2d 1333 (2 Cir.), *cert. denied,* 419 U.S. 993, 95 S.Ct 303, 42 L.Ed.2d 265 (1974); *Tashof* v. *FTC,* 141 U.S.App.D.C. 274, 437 F.2d 707 (1970); *Benrus Watch Co.* v. *FTC,* 352 F.2d 313 (8 Cir. 1965), *cert. denied,* 384 U.S. 939, 86 S.Ct 1457, 16 L.Ed.2d 538 (1966); *Western Radio Corp.* v. *FTC,* 339 F.2d 937 (7 Cir. 1964), *cert. denied,* 381 U.S. 938, 85 S.Ct. 1770,

[23] As to Bates, the Commission advanced an additional justification for covering all food products in its order: the fact that the petitioner was already subject to a number of cease and desist orders concerning its advertising. But of the six orders referred to, five were consent orders which provided that they did "not constitute an admission by proposed respondents that the law has been violated." Bates is correct that the Commission may not rely on such orders as evidence of additional illegal conduct when formulating cease and desist orders in other proceedings. See *NLRB* v. *Local 282, Int'l Bro. of Teamsters, Etc.,* 428 F.2d 994, 1000 (2 Cir. 1970); *NLRB* v. *Local 926, Int. Union of Operating Eng., AFL–CIO,* 267 F.2d 418, 420–21 (5 Cir. 1959).

14 L.Ed.2d 701 (1965); *Niresk Industries, Inc.* v. *FTC*, 278 F.2d 337 (7 Cir.), *cert. denied*, 364 U.S. 883, 81 S.Ct. 173, 5 L.Ed.2d 104 (1960); *Consumer Sales Corp.* v. *FTC*, 198 F.2d 404 (2 Cir. 1952), *cert. denied*, 344 U.S. 912, 73 S.Ct. 335, 97 L.Ed. 703 (1953).[24]

[14] The petitioners also argue that paragraph 2 is overbroad because it is not limited to representations concerning "dramatic" growth but also covers representations that food products contribute to "proper" growth or provide "substantial benefits" for such growth, and because it requires that any food so advertised be capable in fact of significantly contributing to growth "by itself." These elements of the order, however, are reasonably related to the violation found. "Dramatic" or "proper" growth are not markedly different variations on the same basic theme, see *Consumer Sales, supra*, 198 F.2d at 408. The phrase "by itself" does not mean here that the food product must be able to replace all other foods in one's diet; rather by this phrase the Commission properly has sought to preclude misleading claims of substantial contribution to growth merely because a food product, such as Wonder Bread, contains some of the nutrients which comprise part of a healthful diet for children.

[15] Finally, the petitioners argue that the cease and desist order must be limited to advertising directed at children. But the advertising found misleading to children in this case was not restricted to commercials shown on children's programs, and there was evidence in the record that in any event advertisers are not particularly successful in focusing their "impressions" only on the target group of viewers. Since a similar growth theme in Wonder Bread advertisements was aimed at both children and adults, the Commission was justified in directing its order against the petitioners' advertising in general. [224]

VI.

[16] Bates contends that the Commission erred in failing to include in the cease and desist order a provision that Bates would be liable for future violations of the order only if it "knew or had reason to know" of the advertisement's falsity. Although it points to dictum in *Colgate-Palmolive, supra*, in support of the proposition that "the position of an advertising agency necessarily differs from that of the advertiser that retains it," the court is not disposed at this point to lay down a broad

[24] In support of their position the petitioners rely especially on *National Dairy Products Corp.* v. *FTC*, 412 F.2d 605 (7 Cir. 1969); *Grove Laboratories* v. *FTC*, 418 F.2d 489 (5 Cir. 1969); and *American Home Products Corp.* v. *FTC*, 402 F.2d 232 (6 Cir. 1968), cases in which Commission orders were restricted by the court to one product or narrow category of product. In *National Dairy*, however, the court noted that there was no basis for concluding that the proscribed practice would even be illegal in connection with other products, and that unless restricted, the order could reach conduct which had been specifically exonerated in the same FTC proceeding, 412 F.2d at 624. In the other two cases, the violations found, involved misrepresenting specific properties of a particular medication for a specific ailment, and the orders found objectionable, not only included any drug but also its efficacy for any purpose. In the present case, the order, to the extent that it is sustained, is considerably narrower in scope.

rule that advertising agencies are always entitled to a "knew or had reason to know" clause in FTC orders. The relative role and responsibility of advertising agencies and their clients in preparing commercials is a subject about which the Commission has a large measure of expertise and is better left to it on a case by case basis.[25] In any event, it is unnecessary further to consider the issue here because the Commission has conceded that it has no objection to the inclusion of a clause giving Bates a defense of the nature sought, if this court regards such an addition as "appropriate." Because there appears to be no reason why such a clause would be inappropriate, it is directed that the order be modified in the manner suggested by the Commission.

Paragraphs 1 and 3 of the Commission's cease and desist order are deleted and the following clause is added:

> Respondent Ted Bates and Company, Inc., shall have a defense for false advertising representations under this order where it neither knew nor had reason to know that the representations were false.

Enforcement of the order, as modified, is granted.

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[25] It is not inherently unreasonable to suppose that there may be occasions where, if strict liability is to be imposed at all, it is at least as justified with respect to the advertising "agency" as to the producer of the goods advertised.

FEDERAL TRADE COMMISSION v. SIMEON MANAGEMENT CORPORATION, et al.*

No. 75-2363. F.T.C. Docket No. 8996.

(United States Court of Appeals, Ninth Circuit, March 2, 1976, as amended March 22, 1976)

1. OUT OF STATE CIRCULATION OF ADVERTISING SERVED AS SUFFICIENT BASIS FOR CONCLUDING F.T.C. HAD JURISDICTION.

That some allegedly false and unfair advertising by weight reduction clinics circulated out of state was sufficient basis for district court's conclusion that Federal [709] Trade Commission had jurisdiction to regulate such advertising.

2. WHERE DRUG WAS NOT SPECIFICALLY MENTIONED OR SEPARATELY SOLD, CONTESTED ADVERTISING FELL WITHIN SCOPE OF SECTION 12 OF THE F.T.C. ACT.

Allegedly false advertising by weight reduction clinics fell within scope of advertising "for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices or cosmetics," where advertising induced purchase of treatment programs which included administration of drug, though advertising did not specifically mention drug and drug was not sold separately from treatment programs.

3. DISTRICT COURT MUST EXERCISE INDEPENDENT JUDGMENT ON PROPRIETY OF AN INJUNCTION; REASONABLE BELIEF ON PART OF F.T.C. IS INSUFFICIENT TO CONSTITUTE PROPER SHOWING OF FALSE FOOD OR DRUG ADVERTISING.

Under provision of Federal Trade Commission Act providing for injunctive relief when Commission has reason to believe that there is false food and drug advertising and provision of the Act for injunctive relief when the Commission believes there is a violation of any provision of the law that the Commission enforces, showings required for injunctions under each section are essentially the same, and "reasonable belief" on part of Commission is insufficient to constitute "proper showing" of false food and drug advertising; district court must conduct essentially same independent inquiry as required exclusively in second-mentioned provision.

4. THAT COMMERCIAL ADVERTISING IS SUBJECT TO REGULATION SERVING PUBLIC INTEREST DOES NOT PUT IT BEYOND PROTECTION OF FIRST AMENDMENT.

Commercial advertising may be subject to regulation serving important public interest, but is not beyond protection of First Amendment.

5. DISTRICT COURT MUST INDEPENDENTLY DETERMINE A) PUBLIC INTEREST IN ISSUING AN INJUNCTION; B) F.T.C.'S LIKELIHOOD OF SUCCESS ON MERITS ON PROCEEDINGS; AND C) THE BALANCE OF EQUITIES.

To avoid serious constitutional questions, requirement of Federal Trade Commission Act of "proper showing" by Commission for certain injunctive relief would be interpreted as requiring independent determination by district court, and whether Commission seeks injunctive relief against false food and drug advertising

* Reported in 532 F.2d 708 (1976); for case in D.C.N.D. Calif., see 391 F.Supp. 697 (1975), 9 S. & D. 1271. For case before the Commission, see 87 F.T.C. 1189.

or injunctive relief against violation of any provision of law it enforces, district court is required independently to determine whether injunction would be in public interest; determination must be based on likelihood that Commission will succeed on merits for final cease-and-desist order and on balance of equities.

6. SINCE F.D.A. MAY REGARD NUMEROUS RISKY PROCEDURES AS "SAFE," IN VIEW OF THEIR VAST POTENTIAL BENEFITS, CONSIDERATIONS OF SAFETY AND EFFECTIVENESS CANNOT BE COMPLETELY SEPARATE.

Considerations of safety and effectiveness cannot be wholly separated; many risky medical procedures may be regarded by Food and Drug Administration as "safe", in light of their great potential benefits.

7. DISTRICT COURT FINDING THAT F.T.C. WAS UNLIKELY TO SUCCEED IN ESTABLISHING FALSITY OF ADVERTISING WAS NOT CLEARLY ERRONEOUS.

Finding of district court, on application by Federal Trade Commission for injunction against advertising by weight reduction clinics, that Commission was unlikely to succeed in establishing falsity of advertising that treatment programs, which included use of human chorionic gonadotropin were safe, effective and medically approved was not clearly erroneous.

8. IN ONLY RARE CASES WOULD A COURT JUSTIFY A FINDING OF UNLAWFUL CONDUCT NOT SUSTAINED IN F.T.C.'S INITIAL DECISION.

Federal Trade Commission is not bound by initial decision of administrative law judge, but same is indicative of course taken by administrative proceedings; purpose of statute providing for application by Commission for injunctive relief is to protect such proceedings, and only in rare case would court be justified in making finding of unlawful conduct which was not sustained in initial decision by the Commission.

9. THERE IS NO DECEPTION IN ADVERTISING UNLESS THE PUBLIC HOLDS A BELIEF CONTRARY TO MATERIAL FACTS NOT DISCLOSED.

Under Federal Trade Commission Act, advertisers are not required to disclose negative aspects of their product, other than material consequences of normal use; otherwise, advertisement is misleading only if [710] it fails to disclose facts necessary to dissipate false assumptions likely to arise in light of representations actually made, and there is no deception unless public holds belief contrary to material facts not disclosed.

10. DISTRICT COURT PROPERLY REFUSED F.T.C. CONTENTION THAT ADVERTISING WAS "UNFAIR", SINCE F.D.A. HAD DISTINCTLY RECOGNIZED LEGALITY OF USING DRUGS FOR PURPOSES OTHER THAN THOSE FOR WHICH DRUGS HAVE BEEN FOUND TO BE SAFE AND EFFECTIVE.

In view of fact that Food and Drug Administration had specifically recognized legality of using drugs for purposes other than those for which they have been found safe and effective, district court properly refused contention of Federal Trade Commission that advertising was "unfair" within Federal Trade Commission Act because, by encouraging patronage of weight reduction clinics, it violated public policy against use of drugs not established as safe and effective.

11. IN FINDING THAT EQUITIES WEIGHED AGAINST GRANTING AN INJUNCTION TO THE F.T.C., DISTRICT COURT DID NOT ABUSE ITS DISCRETION.

District Court did not abuse discretion in finding that equities weighed against

granting to Federal Trade Commission an injunction against allegedly false, misleading and unfair advertising by weight reduction clinics.

(Syllabus, with substituted captions taken from 532 F.2d 708)

On appeal from denial of preliminary injunction, Court held that district court was not clearly erroneous in finding it unlikely that Commission would succeed in proving falsity of advertising and that equities weighed against granting an injunction was not an abuse of court's discretion.

James P. Timony, Atty. (argued), F.T.C., Washington, D.C., for petitioner-appellant.

Jerry S. Phillips, (argued), Los Angeles, Calif., for respondents-appellees.

Before DUNIWAY and KENNEDY, *Circuit Judges*, and PALMIERI*, *District Judge*.

[710] The Federal Commission Act authorizes district courts to enjoin unfair or deceptive practices pending final resolution of administrative proceedings for cease-and-desist orders. 15 U.S.C. § 53(a)(1970); *id.* § 53(b)(Supp. IV, 1974). In this case the district court denied the FTC's application for such an injunction against advertising by the respondents' weight reduction clinics. 391 F.Supp. 697 (N.D.Cal.1975). We affirm.

The respondents operate weight reduction clinics in California, under various ownerships and trade names. The clinics advertise in magazines, newspapers and on television that their weight loss programs are safe, effective and medically approved.[1] The cost of their treatment programs varies from about $100 to $300, which is comparable to or less than weight reduction treatments from private physicians or university clinics.

All of the clinics in this case use the "Simeons" method for weight loss. After an initial physical examination by a licensed physician, patients are given a four to six week treatment program consisting of a 500 calorie daily diet, medical counseling, and daily injections of human chorionic gonadotropin [HCG]. HCG is a prescription drug approved by the Food and Drug Administration for some uses but not for the treatment of obesity.

In October 1974 the FTC initiated administrative proceedings against the respondent clinics, charging false and unfair advertising in violation of 15 U.S.C. §§ 52 & 45 (1970), *as amended* (Supp. IV, 1974).[2]

* Honorable Edmund L. Palmieri, United States District Judge, Southern District of New York, sitting by designation.

[1] The clinics are registered under the Knox-Mills Health Plan Act, Cal. Gov't Code §§ 12530-39.7 (West Supp.1975). Pursuant to state law, their advertisements have been reviewed by the California attorney general prior to publication. *See id.* § 12537(b).

[2] Section 52 makes unlawful the dissemination of any "false advertisement" to induce "directly or indirectly the purchase of food, drugs, devices or cosmetics"; this section also makes such dissemination an "unfair or deceptive act

(Continued)

At the same time, the Commission applied in federal district court for a preliminary in[711]junction under sections 53(a) & (b). In March 1975 the district judge denied the application on the grounds that the FTC was unlikely to succeed on the merits in its administrative proceedings and that the equities of the case did not favor injunctive relief. In June 1975 the FTC administrative law judge granted a modified version of the requested cease-and-desist order; that decision is now before the Commission on appeal. Simeon Management Corp., FTC Docket No. 8996 (June 18, 1975)(initial decision), *summarized* 3 CCH Trade Reg. Rep. (1975 Trade Cas.) ¶ 20,930. The district court subsequently denied the Commission's motion for an injunction pending appeal of the court's earlier decision.

I. SCOPE OF REVIEW AND FTC JURISDICTION

The district court's denial of a preliminary injunction is subject to a particularly narrow scope of review in this court. "The grant or denial of a preliminary injunction is subject to reversal only if the lower court based its decision upon an erroneous legal premise or abused its discretion." *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1975), *citing Douglas* v. *Beneficial Finance Co.*, 469 F.2d 453, 454 (9th Cir. 1972), *and Burton* v. *Matanuska Valley Lines*, 244 F.2d 647, 651, 17 Alaska 298 (9th Cir. 1957). Thus we are bound by the district court's resolution of conflicting evidence and other findings of fact. If the court applied the proper legal standard, we cannot reverse its decision unless denial of the injunction was so unjustified as to constitute an abuse of discretion.

[1,2] The district court's finding that some of the respondents' advertising circulated out of state was a sufficient basis for its conclusion that the FTC had jurisdiction to regulate that advertising. *Shafe* v. *FTC*, 256 F.2d 661, 663–64 (6th Cir. 1958).[3] The district court also correctly held that this case fell within the scope of section 52, as involving advertising "for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics." It is true that the respondents' advertising does not

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or practice" within the meaning of § 45. "False advertisements," as prohibited by § 52, are defined elsewhere in the Act as those "misleading in a material respect," including either misstatement or nondisclosure of material facts. 15 U.S.C. § 55(a)(1)(1970).

Section 45 makes unlawful "unfair methods of competition" and "unfair or deceptive acts or practices." The FTC is authorized to issue complaints, hold hearings, and issue cease-and-desist orders for violations of this section. Other portions of this section provide for preenforcement review of FTC orders in the United States Court of Appeals.

[3] When the FTC issued the complaint in this case, § 45 applied to activities "in commerce" and § 52 applied to false advertising which was itself "[b]y United States mails, or in commerce" or which was to induce a purchase "in commerce." A provision in the Trans-Alaska Pipeline Act expanded the scope of §§ 45 and 52 from matters "in commerce" to those "in or affecting commerce." 15 U.S.C. § 45 (Supp. IV, 1974); *see id.* § 52. However, this change in jurisdiction does not apply to matters occurring prior to the date of enactment [January 4, 1975]. Pub.L. No. 93-637, § 205(b), 88 Stat. 2193, 2200.

specifically mention HCG, and the drug is not sold separately from the treatment programs. But the advertising does induce the purchase of treatment programs which include administration of the drug, and thus it indirectly induces purchase of the drug. This is sufficient to fall within the broad language of section 52. *See Mueller* v. *United States*, 262 F.2d 443, 447–48 (5th Cir. 1958).

II. THE LEGAL STANDARD FOR GRANTING § 53 INJUNCTIONS

We first consider whether the district court adopted the correct standard in determining the propriety of granting injunctive relief under section 53(a). This section authorizes the Commission to apply to a federal district court when it "has reason to believe" that section 52 (false food and drug advertising) is being violated and that an injunction would be in the public interest. "Upon proper showing" the court is required to grant an injunction without bond, pending the final resolution of administra[712]tive proceedings for a cease-and-desist order.[4]

Section 53(a) has been interpreted in two ways. One interpretation would make a "reasonable belief" by the FTC the requisite standard, requiring the district court to issue an injunction whenever there is a "justifiable basis" for that belief. *FTC* v. *Rhodes Pharmacal Co.*, 191 F.2d 744, 747-48 (7th Cir. 1951), *noted in* 65 Harv.L.Rev. 349 (1951). The other view is that the Commission's reasonable belief serves as a prerequisite only to the *application* for an injunction; the court itself must make further inquiries before granting this extraordinary remedy. Under this view, the "proper showing" specified in section 53(a) requires an independent examination of the merits and a consideration of the equities affecting all the parties. *FTC* v. *National Health Aids, Inc.*, 108 F.Supp. 340, 346 (D.Md.1952). *See also FTC* v. *Sterling Drug, Inc.*, 317 F.2d 669 (2d Cir. 1963) (denying injunction upon finding that advertisements were not false, without deciding relevance of equitable considerations).

In 1973 Congress amended the Act by adding a new section 53(b), authorizing the FTC to seek an injunction when it believes there is a

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[4] The complete section provides:

Whenever the Commission has reason to believe

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 52 of this title, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 45 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 45 of this title, would be to the interest of the public.

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

15 U.S.C. § 53(a)(1970).

violation of "any provision of law" it enforces. This section thus applies to a broad range of violations other than false food and drug advertising, and it also contains procedural provisions not included in section 53(a). For purposes of this case, the relevant distinction is that the new section defines a "proper showing" as follows: "[T]hat, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. § 53(b) (Supp. IV, 1974).[5]

On this appeal the FTC contends that the district court erroneously applied the standard for a proper showing under section 53(b) to that part of its action which alleged false drug advertising and thus fell under section 53(a). The Commission argues that [713] its burden under section 53(a) should be lighter, suggesting that false food and drug advertising is more serious than other violations of the laws it enforces. It relies on *FTC* v. *National-Commission on Egg Nutrition*, 517 F.2d 485, 488–89 (7th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3244 (U.S. Sept. 15, 1975)(No. 75–405). There the Seventh Circuit concluded that the inclusion of specific standards in section 53(b) evidenced a congressional intent to leave the proper showing requirement of section 53(a) unchanged, and reaffirmed its *Rhodes Pharmacal* decision.

[3] There is indeed no indication that the new section was intended to alter the proper showing previously required under section 53(a). However, we believe that the showings required for injunctions under each section are essentially the same. The conference report on the new section 53(b) stated that its language on a proper showing was intended to codify the decisional law of *FTC* v. *National Health Aids, Inc.*, and *FTC* v. *Sterling Drug, Inc.*, *supra*. Thus under both sections, Congress considered that the function of the district court is to "exercise independent judgment on the propriety" of an injunction. Conf. Rep.No.924, 93d Cong., 1st Sess., *reproduced in* 2 U.S.Code Cong. & Admin.News 2523, 2533 (1973). Although not always dispositive, the

[5] The complete section provides:

Whenever the Commission has reason to believe

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

15 U.S.C. § 53(b)(Supp. IV, 1974).

interpretation of a statute by the drafters of subsequent legislation is entitled to significant weight. *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 87–88 & n. 3, 90, 79 S.Ct. 141, 144, 145, 3 L.Ed.2d 132, 135–136, 137 (1958); *see NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275, 279–84, 94 S.Ct. 1757, 1762, 1764–1767, 40 L.Ed.2d 134, 143, 145–148 (1974). Accordingly, we conclude that a "reasonable belief" on the part of the FTC is insufficient to constitute a proper showing under section 53(a). The district court must conduct essentially the same independent inquiry as required explicitly in section 53(b).

[4,5] This interpretation of section 53(a) avoids the constitutional problems that would be presented if only the FTC's reasonable belief were required for an injunction. *See Yates* v. *United States*, 354 U.S. 298, 319, 77 S.Ct. 1064, 1077, 1 L.Ed.2d 1356, 1375 (1957); *Ashwander* v. *TVA*, 297 U.S. 288, 348, 56 S.Ct. 466, 483, 80 L.Ed. 688, 711 (1936) (Brandeis, J., concurring); *Brown* v. *EPA*, 521 F.2d 827, 842 (9th Cir. 1975). Although commercial advertising may be subject to regulation serving an important public interest, it is not beyond the protection of the first amendment. *Compare Bigelow* v. *Virginia*, 421 U.S. 809, 818–21, 825–26, 95 S.Ct. 2222, 2230–2232, 2234–2235, 44 L.Ed.2d 600, 609–611, 613–614 (1975), *with Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376, 388–89, 93 S.Ct. 2553, 2560–61, 37 L.Ed.2d 669, 678–79 (1973). It is generally accepted that false commercial advertising may be prohibited. *E. g., E. F. Drew & Co.* v. *FTC*, 235 F.2d 735, 740 (2d Cir. 1956), *cert. denied*, 352 U.S. 969, 77 S.Ct. 360, 1 L.Ed.2d 323 (1957); *see Bigelow* v. *Virginia*, *supra*, 421 U.S. at 828 & n. 13, 95 S.Ct. at 2236, 44 L.Ed.2d at 615 (by implication). When potentially protected speech is subjected to prior restraint, however, procedural safeguards are vitally important. *Carroll* v. *President & Commissioners of Princess Anne*, 393 U.S. 175, 181–82, 89 S.Ct. 347, 351–352, 21 L.Ed.2d 325, 331–332 (1968). Such safeguards would be inadequate if courts were required under section 53(a) to enjoin advertising because the FTC claimed it was false, without first making an independent determination of the sufficiency of that claim. *See Jacobellis* v. *Ohio*, 378 U.S. 184, 190 & n. 6, 84 S.Ct. 1676, 1679, 12 L.Ed.2d 793, 799 (1964) (opinion of Brennan, J.); *Crowell* v. *Benson*, 285 U.S. 22, 54–65, 52 S.Ct. 285, 293–298, 76 L.Ed. 598, 614–620 (1932). We therefore interpret the statutory requirement for a "proper showing" as compelling such an independent determination by the district court.

In summary, we conclude that the legal standard for granting an injunction under either section 53(a) or 53(b) requires the district court independently to determine whether an injunction would be in the pub[714]lic interest. The court must base this determination on the likelihood that the FTC will succeed on the merits in proceedings for a final cease-and-desist order and on the balance of equities. Thus we

find that the district court adopted the correct legal standard in the instant case.

III. LIKELIHOOD OF SUCCESS ON THE MERITS

The FTC advanced three principal charges in the administrative complaint, and in support of its application for a preliminary injunction. Two of the charges were for dissemination of false advertising in violation of section 52–both by making untruthful claims and by failing to disclose material facts. The third charge against the respondents' advertising was for unfairness in violation of section 45. The district court held that the FTC was unlikely to succeed in establishing any of its charges as violations of the Act and thus denied the preliminary injunction.

A. False Advertising By Misstatement

The court found there was a strong likelihood that the principal claims made in the respondents' advertising—that the treatment programs were safe, effective and medically approved—would not be held untruthful. 391 F.Supp. at 704–05. On appeal the Commission argues that the finding regarding safety is clearly erroneous, because HCG is not safe for older men, who may have latent cancer of the prostate gland.[6]

The treatment programs in question involve the administration of 125 units of HCG six or seven times a week. The FDA has approved the use of HCG as safe and effective in much larger dosages for the treatment of certain cases of prepubertal cryptorchidism and hypogonadism in males and infertility in females.[7] However, HCG is contraindicated for patients with "prostatic carcinoma or other androgen-dependent neoplasm."[8] The effectiveness of HCG in treating certain conditions in males is caused by stimulating the production of testosterone; this is also the basis for its contraindication, since prostate cancer is sensitive to testosterone.[9]

The FTC contends that prostate cancer is widespread among older men and often undetectable in its incipient stage. Where HCG has been found safe and effective—for women, prepubescent males, and males with hypogonadism—prostate cancer is not a potential problem. Thus

[6] The Commission does not seriously challenge the district court's findings regarding effectiveness and medical approval. These representations were made on behalf of the complete treatment programs. Thus even if HCG were ineffective, the 500 calorie diet would produce weight loss. In addition, there was evidence of some medical opinion that HCG could psychologically assist a patient in adhering to the 500 calorie diet. *See* 391 F.Supp. at 704, 705.

[7] Recommended dosages for males range from 500 to 5,000 units, normally administered three times a week for three to six weeks. One approved regimen called for three 4,000 unit doses per week for six to nine months, followed by three additional month of 2,000 unit doses. FDA Follow-up Notice on New Drug Application for Chorionic Gonadotropin, 39 Fed.Reg. 42397, 42402 (Dec. 5, 1974).

[8] *Id.*

[9] *Id.* at 42400.

the FTC claims that HCG is dangerous in the treatment of obesity in older men, and that the physical examinations given by respondents cannot entirely eliminate this danger.[10]

[6,7] The Commission's contentions regarding the safety of HCG are initially disturbing, especially since there is little evidence of the drug's effectiveness as a cure for obesity. Considerations of safety and effectiveness cannot be wholly separated, since many risky medical procedures may be regarded by the FDA as "safe," in light of their greater potential benefits. However, we conclude that the district [715] court's finding regarding the safety of HCG is not clearly erroneous on the basis of the record below.

First, there was no evidence that the low-level dosages of HCG employed by respondents actually increase the levels of testosterone or other androgens in the blood, as do the much larger dosages used in treating sterility conditions.[11] Second, the effect of an increased level of testosterone on incipient prostatic carcinoma remains speculative. Thus the Commission's witness could only suggest a possibility of danger:

> My *opinion* is that it's *entirely possible* that these doses stimulate testosterone secretion and that that *might be harmful* to someone who has a latent tumor, a small cancer of the prostate.

Testimony of Dr. Robert Temple, R.T. 61 [emphasis added]. The court-appointed expert witness, on the other hand, testified that he knew of "no evidence in either direction that this dose of HCG, for this amount of time" would cause the growth of a latent prostate cancer. He also stated that the possible side effects "would not prevent me from suggesting its use in obese patients." Testimony of Dr. John Karam, R.T. 157. Finally, as the district court noted, there was no clinical evidence of harmful effects, such as the aggravation of prostatic cancer, resulting from the use of HCG in treating obesity. 391 F.Supp. at 704. On the basis of this record, we cannot say that it was clear error for the district court to reject the FTC's argument that the respondents' treatment programs were unsafe.

[8] It is also significant that the decision of the FTC administrative law judge did not consider the danger of HCG for men with incipient prostatic cancer.

The determination as to (1) whether HCG is a new drug, and (2) whether HCG is safe and

[10] The district court found that on the basis of initial physical examinations, the weight clinics rejected individuals suffering from those conditions for which HCG is contraindicated. 391 F.Supp. at 701.

[11] The FDA report stated:

The question of whether 125 units [of HCG] per day for more than one month will cause increased levels of blood androgens is thus an extremely important one. This question has not been answered. 39 Fed.Reg. 42397, 42400 (Dec. 5, 1974).

effective, insofar as its use for treating obesity and weight control are concerned, are for the Food and Drug Administration to make.

Initial Decision at 13. Moreover, there was no finding that the respondents' advertising included any misstatements or untruthful claims. Although the Commission is not bound by this initial decision, it is indicative of the course taken by the administrative proceedings. The purpose of section 53 is to protect those proceedings, and only in a rare case would a court be justified in making a finding of unlawful conduct which was not sustained in the FTC's initial decision.

B. False Advertising by Nondisclosure

The FTC attacks the respondents' advertising as misleading for failure to reveal the following facts: (1) that the treatments involve injections of a drug, HCG; (2) that HCG is not approved by the FDA as safe and effective for the treatment of obesity; and (3) that there is no scientific evidence that HCG is more effective in producing weight loss than diet alone. The district court concluded the Commission was unlikely to succeed in establishing that these omissions made the respondents' advertising false under section 52.

Subsequent to the district court's decision, but prior to its order denying an injunction pending appeal, the FTC reached a contrary conclusion on this issue. The administrative law judge approved an order requiring the disclosure in future advertising of facts (1) and (2) above. Initial Decision at 11, 31–32; *see id.* at 20–22. However, this issue is subject to de novo determination by the Commission; more importantly, any final order of the Commission is subject to judicial review before it can be enforced. Thus the favorable initial decision does not necessarily assure the FTC of ultimate success. In predicting whether such success is likely, it is necessary to **[716]** determine whether the FTC's initial decision applied the proper legal standard.

Section 55(a)(1) provides that a determination of false advertising should take into account both the representations made or suggested and the failure "to reveal facts material in the light of such representations or material with respect to consequences [of using] the commodity to which the advertisement relates * * *."

[9] The FTC has claimed that a material fact is one which, if made known to prospective purchasers, would influence their decision. *See* Initial Decision at 21. Yet no single advertisement could possibly include every fact relevant to the purchasing decision; nor is such comprehensiveness required by section 55(a)(1). Advertisers need not disclose negative aspects of their product, other than material consequences of normal use. Otherwise, an advertisement is misleading only if it fails to disclose facts necessary to dissipate false assumptions

likely to arise in light of the representations actually made. There is disagreement as to whether such false assumptions must be actively promoted by the advertisement, or whether it is sufficient that an advertisement fails to correct an independently existing misapprehension about its product.[12] But there is no deception under either standard unless the public holds a belief contrary to material facts not disclosed. *See generally Developments in the Law—Deceptive Advertising*, 80 Harv.L. Rev. 1005, 1047–51 (1967).

In the instant case, the advertising included no information about the use of drugs or, more specifically, HCG in the weight reduction programs. The FTC presented no evidence that those seeing the advertisements formed a belief either that HCG was not used or that, if used, HCG had been approved by the FDA. This would be a different case if the respondents had advertised their use of HCG; one could plausibly suggest that the public would then assume that the drug was effective or approved by the FDA.[13]

Because we do not believe the nondisclosure in this case is materially misleading, we need not consider whether such deception could be justified by the "placebo" effect claimed for the drug. In any event, we note that the district court found that it was not customary medical practice to inform patients whether a prescribed drug was approved by the FDA.[14]

C. "Unfairness" Under § 45

The Commission also claimed the respondents' advertising could be enjoined under section 53(b), as unfair practices in violation of section 45.[15] However, the nature of this part of the FTC's complaint is somewhat unclear. Section 52 provides that violations of its provisions are automatically unfair practices for purposes of section 45. To the extent the FTC alleges violation of section 52, our determination *supra* that the district court correctly denied injunctive relief under section 53(a) precludes such relief under section 53(b).

Section 45 does prohibit a much broader range of practices than those incorporated by reference in section 52. Indeed the language of section 45 is so general that the FTC has developed an extensive body of administrative law to identify the types of practices which are

[12] *Compare Alberty* v. *FTC*, 86 U.S.App.D.C. 238, 182 F.2d 36, 39, *cert. denied*, 340 U.S. 818, 71 S.Ct. 49, 95 L.Ed 601 (1950), *with Brite Mfg. Co.* v. *FTC*, 347 F.2d 477 (D.C.Cir. 1965). *See also J. B. Williams Co.* v. *FTC*, 381 F.2d 884, 890–91 (6th Cir. 1967).

[13] Some of the respondents' advertisements mention the "Simeons" method, and these present a somewhat closer question. However, the injunction sought by FTC was not limited to these advertisements but extended to all advertising by respondents. In addition, there is no evidence that the public is sufficiently aware of the nature of the "Simeons" method to associate it with the use of the drug HCG.

[14] *See* 391 F.Supp. at 705–06.

[15] Section 53(b) expressly requires the district court to consider the likelihood of success on the merits and to balance the equities before issuing an injunction. *See* note 5 *supra*.

"unfair" in violation of this provision. Unfairness in a particular [717] case may turn a great deal on its facts, and thus in ruling on a section 53(b) injunction a district court may have some difficulty in predicting the eventual outcome of the administrative procedures.[16]

[10] In the instant appeal, the FTC claims that the advertising is "unfair" because it encourages patronage of the respondents' clinics, which violate the public policy against use of drugs not established as safe and effective by the FDA. The district court properly rejected this contention, noting that the FDA has specifically recognized the legality of using drugs for purposes other than those for which they have been found safe and effective. 391 F.Supp. at 706–07.

We also note that if advertising is truthful and the underlying activity legal, then forbidding the advertising altogether because public policy disfavors the underlying activity would raise serious first amendment questions. *See Bigelow* v. *Virginia*, 421 U.S. 809, 821–22, 95 S.Ct. 2222, 2232–2233, 44 L.Ed.2d 600, 611–612 (1975). The FTC administrative law judge adopted similar reasoning in denying a total ban on advertising by respondents. Initial Decision at 28–29.

Other than the false advertising and public policy arguments, the FTC has not advanced any rationale for finding the respondents liable for unfair practices.[17] Thus the Commission failed to establish any likelihood of success on the merits of this claim.

IV. BALANCE OF EQUITIES; CONCLUSION

[11] In deciding whether to grant an injunction, the district court must weigh the equities as well as consider the Commission's likelihood of ultimate success. Where, as in the instant case, the court determines the Commission is unlikely to succeed on the merits, then injunctive relief would not normally be granted. *See FTC* v. *Sterling Drug Co.*, *supra*, 317 F.2d at 678.

The district court held that the equities weighed against granting the injunction. The court found that the treatment programs were reasonably priced and effective in helping many patients to lose weight. The court also found that a ban on advertising would cause serious financial harm to the respondents, although it recognized that the public interest was the paramount consideration in this sort of case. 391 F.Supp. at 707. We cannot say that the district court abused its discretion in concluding that the equities favored denial of the injunction.

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[16] *See* Note, *"Corrective Advertising" Orders of the Federal Trade Commission*, 85 Harv.L. Rev. 477, 486–87 (1971).

[17] We have previously suggested that the FTC may find advertising "unfair" under § 45 for failure to make disclosures, even if the omissions would not make the advertising "false" under § 52. *See Feil* v. *FTC*, 285 F.2d 879, 899 (9th Cir. 1960). Under this rationale, a § 53(b) injunction requiring disclosure would be proper in certain cases, even though § 53(a) would be unavailable for the same purpose. We need not reach this point, however, because the FTC's argument here and in the district court was in support of a total prohibition of advertising by respondents.

Our affirmance of the district court's decision to deny injunctive relief is largely a result of our narrow scope of review in such cases. In any future proceedings after the Commission has reached a final decision, we will accord it the deference to which it is entitled as a matter of law. We intimate no view in this opinion as to the appropriate disposition in that case.

AFFIRMED.

FEDERAL TRADE COMMISSION v. DAVID R. MARKIN and CHECKER MOTORS CORPORATION*

No. 75-1443 F.T.C. File 99-182

(United States Court of Appeals, Sixth Circuit, March 5, 1976)

1. COURT SHOULD NOT INTERRUPT ADMINISTRATIVE PROCESS TO DECIDE JURISDICTIONAL ISSUE PRESENTED PRIOR TO FINAL AGENCY ACTION.

   Generally, question of agency coverage or jurisdiction should be judicially reviewed pursuant to Administrative Procedure Act only after agency action has been completed; if question is presented for review prior to final agency decision, court normally should not interrupt administrative process to decide issue.

2. WHERE CLAIM FOR RES JUDICATA AND COLLATERAL ESTOPPEL RESTED ON JUDGMENTS ENTERED 30 YEARS PREVIOUSLY, AND CHANGE OF CIRCUMSTANCE MIGHT PRECLUDE APPLICATION OF THESE DOCTRINES, COURT WOULD NOT INTRUDE INTO ADMINISTRATIVE PROCEEDINGS AND APPLY DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL.

   [542] Court of Appeals would not intrude into administrative proceedings and apply doctrines of res judicata or collateral estoppel to prevent enforcement by Federal Trade Commission of subpoena duces tecum issued by it to taxicab manufacturer in connection with investigation into possible violations of Federal Trade Commission Act where judgments upon which claim of res judicata and collateral estoppel were based were entered 30 years previously and application of such doctrines might be precluded by change in circumstances since those decisions and where questions regarding application of res judicata or collateral estoppel depended on variety of factual determinations which should be made by Commission in first instance.

(Syllabus with substituted captions taken from 532 F.2d 541.)

In affirming district court's subpoena enforcement order, court held that where question of applicability of doctrines of res judicata or collateral estoppel depended on a variety of factual determinations usually made by Commission, court would not interrupt the administrative proceedings and apply these doctrines to prevent enforcement of the subpoena.

Lee A. Freeman, Freeman, Freeman & Salzman, Lee A. Freeman, Jr., John F. Kinney, Chicago, Ill., *Alfred J. Gemrich, Gemrich, Moser, Dombrowski, Bowser & Miller,* Kalamazoo, Mich., for appellants.

Frank S. Spies, U.S. Atty., Grand Rapids, Mich., *John R. Fleder,* U.S. Dept. of Justice, *Gerald Harwood, Robert E. Duncan, Barry R. Rubin,* Federal Trade Commission, Washington, D.C., for appellee.

Before MILLER and ENGEL, *Circuit Judges,* and CHURCHILL,* *District Judge.*

PER CURIAM.

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* Reported in 532 F.2d 541 (1976).

* The Honorable James P. Churchill, United States District Judge for the Eastern District of Michigan, sitting by designation.

Respondents appeal from an order of the district court enforcing with slight modifications a subpoena duces tecum issued by the Federal Trade Commission in March 1973. The subpoena called for the production of a broad range of documents and was issued to further an investigation initiated by an FTC resolution of January 3, 1973. The resolution authorized the FTC's Chicago regional office to determine whether appellants' activities in connection with the ownership, operation, and regulation of taxicab service in commerce were being conducted in an unfair manner with the purpose or effect of restraining competition in violation of § 5 of the Federal Trade Commission Act.

It is urged by the Commission that its investigation will involve inquiry into a number of possible violations of the Federal Trade Commission Act. The investigation is expected to show, according to the Commission, that Checker Motors controls Yellow Cab Corporation of Chicago or Checker Taxi Company, Inc., and operates taxicabs in the Chicago area; that Checker along with others, has conspired to restrain competition in the market for replacement vehicles, parts, supplies, and services; and that Checker has participated in disseminating false and misleading earnings claims in commerce with the result of deceiving drivers and employees who rely upon these claims when applying for jobs, and may have therefore placed competitors at an unfair competitive disadvantage.

Negotiations were instituted over Checker's objections to the subpoena. When these negotiations failed, Checker filed with the FTC a motion to quash the subpoena which was untimely denied. The Commission then filed a petition for enforcement of the subpoena in the district court, thus initiating the present litigation.

Appellants' primary contention on this appeal is that the principles of res judicata and collateral estoppel preclude FTC from conducting its proposed investigation. They argue that the parties and issues in this proceeding are the same parties and issues involved in the *Yellow Cab* decisions, *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947), and *United States* v. *Yellow Cab Co.*, 80 F.Supp. 936 (N.D.Ill.1948), *aff'd*, 338 U.S. 338, 70 S.Ct. 177, 94 L.Ed. 150 (1949). The *Yellow Cab* complaint alleged various violations of the Sherman Act which the Supreme Court considered in three parts: (1) allegations of a conspiracy to restrain taxicab service to [543] and from railroad stations in Chicago, (2) allegations of a conspiracy to restrain the sale of taxicabs, replacement parts and accessories in Chicago and several other cities and to exclude all manufacturers other than Checker Motors from these markets, and (3) allegations of a conspiracy to prevent competition for exclusive contracts to transfer interstate passengers between Chicago railroad stations.

As to the first category, the Supreme Court affirmed the district court's dismissal of the charge, finding that local taxicab service in Chicago conveying interstate passengers between local railroad stations was not an integral part of interstate commerce and that, therefore, a restraint on this local service, without more, would not violate the Sherman Act. The Court then determined that the claims of a conspiracy to restrain competition in the market for the sale of vehicles, replacement parts and accessories did involve interstate commerce and constituted, if established by proof, violations of the Sherman Act. On remand, the district court after trial dismissed the latter charge on the ground that the evidence did not establish the government's theory. *United States* v. *Yellow Cab Co.*, 80 F.Supp. 936 (N.D.Ill.1948). The Supreme Court affirmed, 338 U.S. 338, 70 S.Ct. 177, 94 L.Ed. 150 (1949). In its initial consideration of the case the Supreme Court also found that the allegations of a conspiracy to prevent competition in contracts to transfer interstate passengers between railroad stations charged a Sherman Act violation.

Respondents argue that the Supreme Court's finding in *Yellow Cab* that local taxicab services in Chicago do not affect interstate commerce precludes investigation by the Commission of anticompetitive conduct in the operation of local taxicab service in Chicago. Similarly, respondents contend that the district court's finding on remand, affirmed by the Supreme Court, that the alleged conspiracy to restrain competition in the market for the sale of vehicles and replacement parts and accessories had not been established by proof, precludes re-investigation of that issue.

[1] The district court in a carefully reasoned opinion found that enforcement of the subpoena duces tecum in the present investigative proceeding is not barred by the rulings in the *Yellow Cab* cases on the theory of res judicata or collateral estoppel. *F.T.C.* v. *Markin*, 391 F.Supp. 865 (W.D. Mich.1974). We agree with its findings and conclusions and will add only a few comments. Generally, a question of agency coverage or jurisdiction should be judicially reviewed pursuant to 5 U.S.C. § 706 only after agency action has been completed. If such a question is presented for review prior to a final agency decision, a court normally should not interrupt the administrative process to decide the issue. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938). *Accord, FPC* v. *Arkansas Power and Light Co.*, 330 U.S. 802, 67 S.Ct. 963, 91 L.Ed. 1261 (1947), *reversing per curiam*, 81 U.S.App.D.C. 178, 156 F.2d 821 (1946); *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540, 543–45, 66 S.Ct. 712, 713–14, 90 L.Ed. 839, 841–42 (1945). Rather, the court should defer to agency expertise and "let the agency develop the necessary factual background upon which decisions should be based." *McKart* v. *United*

States, 395 U.S. 185, 193–94, 89 S.Ct. 1657, 1662, 23 L.Ed.2d 194, 203 (1965).

The doctrine of *Myers, supra*, was specifically applied by the Supreme Court in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 211–14, 66 S.Ct. 494, 506–08, 90 L.Ed. 614, 631–32 (1946), to deny to a litigrant the right to assert a question of jurisdiction or coverage as a defense in a subpoena enforcement proceeding. *See also FTC* v. *Crafts*, 355 U.S. 9, 78 S.Ct. 33, 2 L.Ed.2d 23 (1957), *reversing per curiam*, 244 F.2d 882 (9th Cir.); *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509, 63 S.Ct. 339, 343, 87 L.Ed. 424, 429 (1943). In addition, *Myers* has been applied to a situation in which res judicata was asserted as a defense. *Cf. Otis & Co.* v. *SEC*, 338 U.S. 843, 70 S.Ct. 89, 94 L.Ed. 516 (1949), *reversing per curiam*, 176 F.2d 34 (D.C. Cir. 1949).

[2] Respondents' argument that the present case is one requiring exclusively **[544]** legal inquiries not involving agency expertise and therefore within an exception to the *Myers* doctrine is not persuasive. While this exception has been articulated, *see McKart* v. *United States*, *supra*, 395 U.S. at 197–99, 89 S.Ct. at 1664–65, 23 L.Ed.2d at 205–06; *Borden, Inc.* v. *FTC*, 495 F.2d 785, 787 (7th Cir. 1974); *Sterling Drug, Inc.* v. *FTC*, 146 U.S.App.D.C. 237, 450 F.2d 698, 710–11 (1971); *Jewel Companies, Inc.* v. *FTC*, 432 F.2d 1155, 1159 (7th Cir. 1970), *case dismissed as moot*, 479 F.2d 1323 (1973); *Elmo Division of Drive-X* v. *Dixon*, 121 U.S.App.D.C. 113, 348 F.2d 342, 345 (1965), we find it inapposite in the case before us. Whether or not res judicata or collateral estoppel should be applied in this case depends on a variety of factual determinations which should be made by the Commission in the first instance.

Our conclusion that the subpoena should be enforced does not rest merely on an automatic application of the doctrine of exhaustion of administrative remedies or a desire to defer to agency expertise. The basic weakness in respondents' position is that neither the district court nor FTC has sufficient information at the present time to make the factual findings required to resolve the principal issue of res judicata or collateral estoppel. The administrative proceeding should not be interrupted by judicial intrusion before the pertinent facts are determined and assessed by the Commission.

The FTC is proceeding in this case under the Federal Trade Commission Act while the *Yellow Cab* cases arose under the Sherman Act. It is true enough that this fact may not necessarily preclude application of res judicata, *see United States* v. *Willard Tablet Co.*, 141 F.2d 141 (7th Cir. 1944); *George H. Lee Co.* v. *FTC*, 113 F.2d 583, 586 (8th Cir. 1940). Nevertheless, the differences in the two make it more difficult at this stage to decide whether precisely the same issues are involved as were litigated in the *Yellow Cab* cases. There is authority

that the Federal Trade Commission Act is of broader scope than the Sherman Act, reaching more conduct at an earlier time. *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239, 92 S.Ct. 898, 903, 31 L.Ed.2d 170, 176 (1972); *FTC* v. *Motion Picture Ad Service Co.*, 344 U.S. 392, 394–95, 73 S.Ct. 361, 363, 97 L.Ed. 426, 429–30 (1953). Thus, conduct violating the Federal Trade Commission Act might not constitute a violation of the Sherman Act. We agree with the district court that the application of res judicata and collateral estoppel may be precluded by a change in circumstances since the *Yellow Cab* cases were decided nearly 30 years ago. *See FTC* v. *Raladam*, 316 U.S. 149, 150-51, 62 S.Ct. 966, 967–68, 86 L.Ed. 1336, 1339–40 (1942); *Exposition Press, Inc* v. *FTC*, 295 F.2d 869, 872 (2d Cir. 1961), *cert. denied*, 370 U.S. 917, 82 S.Ct. 1554, 8 L.Ed.2d 497 (1962).

Appellants also contend that this investigation is improper because it concerns matters wholly within the regulatory authority of the City of Chicago and thus is within the principle of *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), that actions undertaken pursuant to comprehensive state or local regulation cannot form the basis for an antitrust charge. We think that the applicability of *Parker* v. *Brown*, *supra*, should be determined by the Commission in the first instance.

Respondents' other arguments we find to be without merit.

For the reasons stated herein and by the district court in its opinion, the district court's order enforcing the subpoena is hereby

AFFIRMED.

FRANCIS J. CHARLTON v. FEDERAL TRADE COMMISSION*

No. 74–1571. F.T.C. Docket No. 129–8

(United States Court of Appeals, District of Columbia, March 10, 1976)

1. ATTORNEY'S LICENSE TO PRACTICE LAW IS A RIGHT WHICH CANNOT BE TAKEN FROM HIM LIGHTLY OR CAPRICIOUSLY, NOT A MATTER OF GRACE AND FAVOR.

Privilege of practicing law is not a matter of grace and favor, but attorney's license to practice is right which cannot lightly or capriciously be taken from him.

2. ONLY IN CLEAR CASES OR MISCONDUCT WHICH AFFECTS PARTY'S STANDING AND CHARACTER AS AN ATTORNEY SHOULD POWER TO WITHDRAW RIGHT TO PRACTICE BE EXERCISED, AND THEN, WITH GREAT CAUTION.

Power to withdraw right to practice law ought to be exercised with great caution and ought never to be exercised except in clear cases of misconduct which affect standing and character of party as attorney.

3. DISBARMENT, DESIGNED TO PROTECT THE PUBLIC, IS PENALTY IMPOSED ON ATTORNEY IN DISCIPLINARY HEARINGS, WHICH ARE ADVERSARY PROCEEDINGS OF A QUASI-CRIMINAL NATURE.

Disciplinary proceedings are adversary proceedings of quasi-criminal nature and disbarment, designed to protect the public, is punishment or penalty imposed.

4. IN DISBARMENT PROCEEDINGS, ATTORNEY IS ENTITLED TO PROCEDURAL DUE PROCESS.

Attorney is entitled to procedural due process in disbarment proceedings.

5. BURDEN OF PROVING THE UNWORTHINESS OF CHARGED ATTORNEY IN DISCIPLINARY PROCEEDINGS RESTS WITH THE CHARGING PARTY.

Charging party in disciplinary proceedings has burden of proving that charged attorney is no longer worthy of his office.

6. ADMINISTRATIVE FINDINGS OF FACT MUST BE SUSTAINED, ON JUDICIAL REVIEW, WHEN SUPPORTED BY SUBSTANTIAL EVIDENCE AS A WHOLE.

On judicial review of agency action, administrative findings of fact must be sustained when supported by substantial evi[904]dence on record considered as a whole.

7. IN EMPLOYING "SUBSTANTIAL EVIDENCE" BURDEN OF PROOF RATHER THAN PREPONDERANCE OF EVIDENCE RULE, FTC ERRED IN REPRIMANDING ATTORNEY AND IMPOSING A ONE-YEAR SUSPENSION FROM PRACTICING BEFORE THE COMMISSION.

Federal Trade Commission, in reprimanding attorney and imposing one-year suspension from practicing before it because of attorney's action in allegedly passing on to his employer confidential intra-agency document of privilege nature, erred in employing "substantial evidence" burden of proof rather than preponderance of the evidence rule.

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* Reported in 543 F.2d 903 (1976).

(Syllabus, with substituted captions, taken from 543 F.2d 903)

On appeal from district court judgment upholding F.T.C. order reprimanding and barring an attorney from practicing before the Commission for a one year period, Court of Appeals held that the F.T.C. erred in employing a "substantial evidence" burden of proof rather than the preponderance of evidence rule in its hearing.

Reversed and Remanded.

Henry J. Cappello, Washington, D.C., for appellant.

Albert H. Turkis, Asst. U. S. Atty., Washington, D.C., with whom *Earl J. Silbert*, U. S. Atty., *John A. Terry*, *James F. McMullin*, *Peter R. Reilly* and *David T. Stitt*, Asst. U. S. Attys., Washington, D.C., were on the brief, for appellee.

Before TAMM, LEVENTHAL and ROBINSON, *Circuit Judges*.

Opinion for the Court filed by Circuit Judge SPOTTSWOOD W. ROBINSON, III.

Circuit Judge TAMM dissents from the foregoing opinion.

SPOTTSWOOD W. ROBINSON, III, *Circuit Judge:*

This appeal tenders a variety of objections to an order of the Federal Trade Commission reprimanding Francis J. Charlton, a member of its bar, and suspending him from practice before the Commission for one year.[1] On Charlton's ensuing challenge in the District Court, summary judgment was rendered in favor of the order.[2] We find, upon examination of the administrative record, that the Commission utilized an erroneous standard in measuring the evidence that led it to take disciplinary action. So, without reaching any other issue now pressed, we reverse the summary judgment and remand the case to the District Court with instructions to vacate the Commission's order and direct it to reconsider the evidence conformably with this opinion.

I

For nearly eight years, Charlton, a member of the Massachusetts and New York bars, was employed as a Commission attorney. After rising to the position of Chief of the Division of Food and Drug Advertising, he resigned to join the legal staff of General Foods Corporation. Less than three years later, he stood accused of transmitting to his employer a confidential Commission document describing evidence gathered in an ongoing investigation of breakfast cereal companies, including General Foods.[3]

Charlton admits that he received the document from a recently-

[1] *Francis J. Charlton*, No. 129-8 (F.T.C. Sept. 18, 1973) (unreported).

[2] *Charlton v. FTC*, Civ. No. 1926-73 (D.D.C. Apr. 4, 1974).

[3] The Commission had issued a formal complaint charging manufacturers of ready-to-eat breakfast cereals, among them General Foods, with unfair and anticompetitive business practices violative of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970). *Kellogg Co.*, No. 8883 (F.T.C. Apr. 25, 1972).

resigned Commission attorney and passed it on to his supervisor at General Foods. Charlton denies, however, that at the time he had knowledge of the contents of the document, and on that basis he vigorously protested his innocence. Thus emerging was a critical issue as to Charlton's credibility in light of the circumstantial import of other evidence presented to the Commission. No purpose useful to treatment of our immediate problem could be served by detailing the Commission's factual findings with reference to the charge. A sketch of the significant procedural events, however, is necessary to put the problem in proper context.

The Commission's handling of the incident began on an informal note. General **[905]** Foods promptly notified the Commission of Charlton's transmittal of the document.[4] The Commission's chairman then referred the matter to the Department of Justice which, after investigation, concluded that there had been no violation of federal criminal law.[5] Some months later, the Commission honored Charlton's request for a hearing[6] by issuing an order requiring him to show cause why disciplinary action, including disbarment, should not be taken.[7] At the hearing, Charlton was represented by counsel and testified extensively in his own behalf.

In due course, the Commission announced its decision.[8] In its view, "[d]isciplinary proceedings against attorneys charged with improper conduct are inquisitorial rather than adversary in form and are corrective rather than punitive in purpose."[9] The Commission also felt that "[p]rocedurally, the task of the relevant tribunal is to use the simplest and most direct means of fairly determining, in the circumstances of the particular case, whether the alleged improper conduct has in fact taken place."[10] And, the Commission continued,

[t]he procedural requirements here are that (1) the accused attorney be given notice of

[4] Very shortly thereafter, General Foods also discharged Charlton and his supervisor.

[5] See 15 U.S.C. § 50, 18 U.S.C. § 641 (1970).

[6] The Commission takes the position that "[t]here is generally no occasion to challenge an attorney's fitness to practice before an agency such as this until he actually attempts to appear before it and his qualifications are challenged." *Francis J. Charlton*, *supra* note 1, at 5 n. 4.

[7] The order was issued pursuant to the Commission's practice rules in relevant part providing:

> (1) All attorneys practicing before the Commission shall conform to the standards of ethical conduct required of practitioners in the courts of the United States and by the bars of which the attorneys are members. (2) If for good cause shown, the Commission shall be of the opinion that any attorney is not conforming to such standards or that he has been otherwise guilty of conduct warranting disciplinary action, the Commission may issue an order requiring such attorney to show cause why he should not be suspended or disbarred from practice before the Commission. The alleged offender shall be granted due opportunity to be heard in his own defense and may be represented by counsel. Thereafter, if warranted by the facts, the Commission may issue against the attorney an order of reprimand, suspension, or disbarment.

16 C.F.R. § 4.1(4)(d) (1975).

[8] *Francis J. Charlton*, *supra* note 1.

[9] *Id.* at 20.

[10] *Id.*

charges, with an opportunity to be heard, and (2) the disciplinary order, if any, be based upon substantial evidence of record.[11] "Substantial evidence" means neither "preponderance" of the evidence nor that required to show guilt "beyond a reasonable doubt." It is, rather, " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' * * * This is something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. * * *"[12]

Applying that standard, the Commission concluded that "Charlton should have known and did know that the document he transmitted to the General Foods Corporation * * * was a confidential intraagency document of a privileged nature and that his transmittal to that private firm was an improper act that reflected adversely on his fitness to practice before this agency."[13] On that evaluation of the evi[906]dence, the Commission reprimanded Charlton and imposed a one-year suspension from practice before the Commission, but immediately reinstated him as a member of its bar.[14]

Charlton then came to the District Court in an effort to set aside the Commission's decision and order. The Commission moved for summary judgment on the administrative record, and the court granted the motion.[15] Charlton's appeal then brought the case here.

II

We perceive one error which, all else aside, necessitates administrative reconsideration of the evidence. The crux of the difficulty is the Commission's use of a totally incorrect standard of proof in passing on Charlton's blameworthiness. It follows that, however Charlton might fare on his other contentions, the Commission's present disciplinary order could not be left standing.

[1-4] The privilege of practicing law "is not a 'matter of grace and favor' ";[16] on the contrary, as quite recently recorded, "we have always viewed an attorney's license to practice as a 'right' which cannot lightly or capriciously be taken from him."[17] We have, too, remained advertent[18] to the Supreme Court's admonition that the

[11] We omit the Commission's footnote at this point.

[12] *Francis J. Charlton*, *supra* note 1, at 20–21, quoting *Consolo* v. *FMC*, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131, 140 (1966), in turn quoting *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126, 140 (1938) (citations and footnotes omitted).

[13] *Francis J. Charlton*, No. 129–8 (F.T.C., order of Sept. 18, 1973).

[14] The Commission was constrained "to temper justice with mercy," *Francis J. Charlton*, *supra* note 1, at 24, and dated the suspension from May 17, 1972, when the incident first came to the Commission's attention. *Id.* at 25. Since the one-year suspension period terminated prior to the Commission's disciplinary order on September 18, 1973, Charlton was eligible to practice before the Commission immediately.

[15] *Charlton* v. *FTC*, *supra* note 2.

[16] *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96, 102, 83 S.Ct. 1175, 1179–1180, 10 L.Ed.2d 224, 228 (1963), quoting *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 379, 18 L.Ed. 366, 370 (1867).

[17] *Kivitz* v. *SEC*, 154 U.S.App.D.C. 372, 378, 475 F.2d 956, 962 (1973).

[18] See In re Adriaans, 28 App.D.C. 515, 524 (1907); *Dorsey* v. *Kingsland*, 84 U.S.App.D.C. 264, 266, 173 F.2d 405, 407, *rev'd on other grounds*, 338 U.S. 318, 70 S.Ct. 123, 94 L.Ed. 123 (1949).

power to withdraw that right "ought always to be exercised with great caution; and ought never to be exercised except in clear cases of misconduct, which affect the standing and character of the party as an attorney."[19] And contrary to the Commission's concept,[20] disciplinary proceedings "are adversary proceedings of a quasi-criminal nature,"[21] and "[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer."[22]

[5] Not surprisingly, then, it has become well settled that the charging party has the burden of proving that the charged attorney is no longer worthy of his office.[23] It **[907]** was in the definition of that burden—in the degree of proof required—that the Commission faltered grievously. Its decision on disciplinary action was, in its words, to "be based upon substantial evidence of record."[24] "Substantial evidence," the Commission said, was not "the 'preponderance' of the evidence";[25] but "something less than the weight of the evidence";[26] it was, the Commission declared, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[27] In adopting that formulation as the criterion by which Charlton's conduct was to be gauged, the Commission hopelessly confused two legal canons designed to serve entirely distinct purposes.

[6] To be sure, on judicial review of agency action, administrative findings of fact must be sustained when supported by substantial evidence on the record considered as a whole.[28] But that rule implicates only the reviewing court; the yardstick by which the agency itself is to initially ascertain the facts is something else again.[29] We need not

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[19] *Ex parte Wall*, 107 U.S. 265, 288 2 S.Ct. 569, 589, 27 L.Ed. 552, 561 (1883).

[20] See text *supra* at note 9.

[21] *In re Ruffalo*, 390 U.S. 544, 551, 88 S.Ct. 1222, 1226, 20 L.Ed.2d 117, 122 (1968). And while we agree with the Commission on the desirability of "the simplest and most direct means of fairly determining" disciplinary charges, see text *supra* at note 9, "[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer [and] [h]e is accordingly entitled to procedural due process * * *." *Id.* See also *Theard* v. *United States*, 354 U.S. 278, 282, 77 S.Ct. 1274, 1276, 1 L.Ed.2d 1342, 1345 (1957); *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682, 694 (1948); *Selling* v. *Radford*, 243 U.S. 46, 51, 37 S.Ct. 377, 379, 61 L.Ed. 585, 588 (1917); *Committee on Professional Ethics & Grievances* v. *Johnson*, 477 F.2d 169, 173 (3d Cir. 1971); *In re Echeles*, 430 F.2d 347, 350 (7th Cir. 1970).

[22] *In re Ruffalo*, *supra* note 21, 390 U.S. at 550, 88 S.Ct. at 1226, 20 L.Ed.2d at 122. See also *Spevack* v. *Klein*, 385 U.S. 511, 514–516, 87 S.Ct. 625, 627–629, 17 L.Ed.2d 574, 577–578 (1967).

[23] *Board of Comm'rs of Alabama State Bar* v. *Jones*, 291 Ala. 371, 281 So.2d 267, 274 (1973); *State ex rel. Florida Bar* v. *Grant*, 85 So.2d 232, 238 (Fla.1956); *In re Brown*, 389 Ill. 516, 59 N.E.2d 855, 858, 157 A.L.R. 604 (1945); *In re Witherow*, 226 Minn. 58, 32 N.W.2d 176, 177 (1948); *In re Feitman*, 51 N.J. 27, 237 A.2d 473, 474 (1968); *State* v. *Bomer*, 179 Tenn. 67, 162 S.W.2d 515, 520, *cert. denied*, 318 U.S. 771, 63 S.Ct. 764, 87 L.Ed. 1141 (1942).

[24] See text *supra* at note 12.

[25] See text *supra* at note 12.

[26] See text *supra* at note 12.

[27] See text *supra* at note 12.

[28] See Federal Trade Commission Act, § 5, as amended, 15 U.S.C. § 45(c)(1970); Administrative Procedure Act § 10, 5 U.S.C. § 706 (1970). See also *NLRB* v. *Brown*, 380 U.S. 278, 292, 85 S.Ct. 980, 988, 13 L.Ed.2d 839, 849 (1965); *United States* v. *Carlo Bianchi Co.*, 373 U.S. 709, 715–718, 83 S.Ct. 1409, 1413–1415, 10 L.Ed.2d 652, 657–660 (1963); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 207–209, 67 S.Ct. 1575, 1582–1583, 91 L.Ed. 1995, 2005–2006 (1947); *Wheatley* v. *Adler*, 132 U.S.App.D.C. 177, 180, 407 F.2d 307, 310 (*en banc* 1968); *Braniff Airways, Inc.* v. *CAB*, 126 U.S.App.D.C. 399, 412, 379 F.2d 453, 456 (1967); *American Trucking Ass'ns* v. *FCC*, 126 U.S.App.D.C. 236, 249, 377 F.2d 121, 134 (1966), *cert. denied*, 386 U.S. 943, 87 S.Ct. 973, 17 L.Ed.2d 874 (1967).

[29] "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof." Administrative Procedure Act § 7(c), 5 U.S.C. § 556(d)(1970).

pause to elaborate on the differing norms for treatment of the evidence in administrative and reviewing tribunals, respectively.[30] It suffices for present purposes simply to recall that in American law a preponderance of the evidence is rock bottom at the factfinding level of civil litigation.[31] Nowhere in our jurisprudence have we discerned acceptance of a standard of proof tolerating "something less than the weight of the evidence."[32]

[7] Disciplinary proceedings against attorneys do not involve any departure from the orthodox rule governing resolution of civil evidentiary contests. Almost seventy years ago, this court declared that the "charge should be supported by a preponderance of satisfactory evidence. The case should be clear and free from doubt."[33] The same view, though variously articulated[34] is the touchstone of judicial decisions **[908]** across the Nation,[35] the bare minimum for a finding of misconduct is the greater convincing power of the evidence.[36] That the proceeding is administrative rather than judicial does not diminish this wholesome demand,[37] and the requirement should not have been relaxed in the case at bar.

We are unable to detect from the administrative record whether

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[30] See generally 4 K. Davis, Administrative Law §§ 29.01–29.11 (1958).

[31] See, *e.g.*, the numerous cases collected in 9 J. Wigmore, Evidence, § 2498 at 325–326 n. 1 (3d ed. 1940), Supp.1975 at 118–119 n. 1. Sometimes the standard is expressed in somewhat varying phraseology, but the meaning remains substantially equivalent. *Id.* § 2498 at 325–327.

[32] See text *supra* at note 12.

[33] *In re Adriaans*, *supra* note 18, 28 App.D.C. at 524. See also *Dorsey* v. *Kingsland*, *supra* note 18, 84 U.S.App.D.C. at 265–266, 173 F.2d at 406–407.

[34] For example, "clear preponderance" of the evidence, *In re Hertz*, 139 Minn. 504, 166 N.W. 397, 408 (1918); *State* v. *Gudmundsen*, 145 Neb. 324, 16 N.W.2d 474, 476 (1944); *In re Little*, 40 Wash.2d 421, 244 P.2d 255, 260 (1953); *In re Hendricks*, 155 W.Va. 516, 185 S.E.2d 336, 342 (1971); "clear and convincing evidence" *Medoff* v. *State Bar of California*, 71 Cal.2d 535, 78 Cal.Rptr. 696, 455 P.2d 800, 810 (1969); *Bar Assoc. of Baltimore City* v. *Marshall*, 269 Md. 510, 307 A.2d 677, 681 (1973); *State Board* v. *Dodge*, 93 Minn. 160, 100 N.W. 684, 689 (1904); *In re Otterness*, 181 Minn. 254, 232 N.W. 318, 319, 73 A.L.R. 1319 (1930); *In re Martin*, 67 N.Mex. 276, 354 P.2d 995, 998 (1960); "clearly established" and similar expressions, *Bodisco* v. *State Bar of California*, 58 Cal.2d 495, 24 Cal.Rptr. 835, 374 P.2d 803, 805 (1962); *Gordon* v. *Clinkscales*, 215 Ga. 843, 114 S.E.2d 15, 21 (1960); *People* v. *Kerker*, 315 Ill. 572, 146 N.E. 439 (1925); *In re Lemisch*, 321 Pa. 110, 184 A. 72, 74 (1936).

[35] *Hurst* v. *Bar Rules Comm.*, 202 Ark. 1101, 155 S.W.2d 697, 701 (1941); *In re Trask*, 46 Hawaii 404, 380 P.2d 751, 755–756 (1963); *In re Posler*, 390 Mich. 581, 213 N.W.2d 133 (1973); *In re Krehel*, 419 Pa. 86, 213 A.2d 375, 376–377 (1965); *In re Wright*, 131 Vt. 473, 310 A.2d 1, 9–10 (1973).

[36] See the case-collection cited *supra* note 31. In concluding that substantial evidence of record suffices to underpin disciplinary action by an agency against a member of its bar, the Commission relied upon seven decisions, only two of which touched in any way on the quantum of proof required at the hearing stage. In *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957), the question was whether a state's denial of the opportunity to qualify for the practice of law, on grounds of the applicant's prior arrests, use of aliases and membership in the Communist Party, deprived him of due process of law. In *Goldsmith* v. *United States Bd. of Tax Appeals*, 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 494 (1926), the issue was whether admission to practice as a certified public accountant before the Board of Tax Appeals could be refused after an ex parte investigation without notice of and hearing on the charges upon which the refusal was based. *Kivitz* v. *SEC*, *supra* note 17, a review by this court of an agency disciplinary proceeding, does not discuss the standard of proof required at the hearing level; the evidence was held to be legally insufficient to support any disciplinary action whatever. And see note 17 *supra* and accompanying text. *Consolidated Edison Co.* v. *NLRB*, *supra* note 12, was a review of a hearing on unfair labor practices, and *Consolo* v. *FMC*, *supra* note 12, a review of a hearing on reparation awards. None of these cases was even remotely concerned with the question we now face. In *Ex parte Wall*, *supra* note 19, numerous issues were raised with respect to a disbarment proceeding, but none as to the caliber of proof essential. And see note 19 *supra* and accompanying text. And in *Dorsey* v. *Kingsland*, *supra* note 18, this court, in direct opposition to the Commission's holding in this case, held that the proper standard is a preponderance of the evidence.

[37] *See e.g.*, *Kivitz* v. *SEC*, *supra* note 17; *Dorsey* v. *Kingsland*, *supra* note 18.

Charlton fell heir to the Commission's "substantial evidence" aberration because of some form of inadvertence, or rather because the Commission consciously felt that it was legally sound. Whatever the reason, the course of action now needed is clear. We reverse the District Court's summary judgment against Charlton and remand the case for further proceedings. The District Court will vacate the Commission's disciplinary order and will, in turn, remand to the Commission with instructions that it reconsider the evidence and redetermine the charge by application of the preponderance-of-the-evidence rule. We do not suggest that an additional evidentiary presentation is entailed; the Commission may well find it feasible to predicate its new decision on the record in its present state. And it goes without saying that we intimate no view as to what that decision should be. The District Court should also retain jurisdiction of the case pending completion of the Commission's activities on remand.

With this disposition, there is no occasion to consider other arguments which Charlton has advanced on this appeal. Of course, should he be dissatisfied with the outcome on remand, he may again travel the path of judicial review.

Reversed and remanded.

AMWAY CORP. v. FEDERAL TRADE COMMISSION*

Civ. A. No. 75–1274. F.T.C. Docket No. 9023.

(United States District Court, District of Columbia, March 10, 1976)

On cross-motions for summary judgment, court held that, under the Freedom of Information Act, identities of confidential sources in investigatory records and intra-agency memoranda relating to decision making were exempted from discovery. Moreover, without possibly compromising of deliberative process, the bulk of the factual material requested could not be segregated from the deliberative documents.

Philip C. Larson, Washington, D.C., for plaintiff.
Peter C. Schaumber, Washington, D.C., for defendant.
Before, BRYANT, *District Judge*.

MEMORANDUM AND ORDER

This action is now before the Court on plaintiff's and defendants' cross-motions for summary judgment and defendants' alternative motion to dismiss. In this action, plaintiff ("Amway") seeks an order requiring the defendants, Federal Trade Commission ("FTC"), to produce certain documents pursuant to its request under the Freedom of Information Act ("FOIA"), as amended, 5 U. S. C. § 552. For reasons and to the extent set forth below the Court grants partial summary judgment for both Amway and the FTC.

Summary of the Facts

Amway is a Michigan Corporation engaged in the manufacture and sale, through independent distributors, of a variety of home care, personal care, automotive care, food supplement and other products. In November 1969, the FTC commenced a non-public investigation of multi-level selling organizations pursuant to the FTC's authority under the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.* The purpose of the investigation was to determine whether any of these multi-level selling organizations were engaged in anti-competitive or deceptive practices and if so, initiate appropriate law enforcement proceedings to remedy the situation.

During the course of that investigation, the FTC compiled extensive information regarding the Amway operation. A great deal of this information was solicited and came from Amway distributors. As a result, Amway in letters dated February 21, 1974 and addressed to each member of the FTC requested that corrective action be taken

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 60,798 at 68,442 (1976–1 Trade Cases).

with respect to what it alleged was improper investigative conduct by the FTC's staff. The Commission through its Secretary acknowledged receipt of the Amway letters, and authorized its Director of the Bureau of Competition to respond that he regarded their complaints as lacking in substance.

On March 25, 1975, the FTC issued a complaint against Amway, Docket No. 9023, setting forth in five separate counts allegedly anti-competitive and deceptive practices having an adverse effect on commerce and tending to mislead distributors, dealers and prospective participants in the Amway organization.

Subsequent to the issuance of the complaint against Amway, Amway's counsel (Mr. Lee Loevinger) by letter of April 15, 1975 requested, pursuant to Section 552 of the FOIA, access to a number of documents related to the Amway investigation and complaint as well as the Amway letter of February 21, 1974. On April 25, 1975 the FTC notified Amway that its request had been granted in part and denied in part. The FTC's denials were premised on exemptions set forth is 5 U.S.C. § 552(b)(4), (b)(5) and 5 U.S.C. § 552(b)(7)(D).[1] On May 9, 1975, Amway appealed the Secretary's initial refusal to grant access to all of the documents and records requested. On June 18, 1975 the Commission informed Amway that the appealed determinations were in large part affirmed. It also instructed the Secretary's office to conduct an additional search for documents that might have been responsive to Amway's request. At the close of the additional search, the FTC contended that all additional documents found were exempt pursuant to Section 552(b)(5).

On August 4, 1975 Amway filed this action requesting access to the withheld documents. After compiling an index and answering Amway's first set of interrogatories, defendant FTC filed this motion to dismiss or in the alternative for summary judgment. Amway then filed a cross-motion for summary judgment.

After examining the various papers and defendants' index, the Court on February 12, 1976 ordered the submission of particular documents for an *in camera* inspection in order to resolve disputed issues of material fact.

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[1] Exemption 4 of the FOIA provides that material need not be disclosed if it constitutes "* * * trade secrets and commercial or financial information obtained from a person, and privileged or confidential." 5 U.S.C. § 552(b)(4).

Exemption 5 of the FOIA exempts from disclosure "* * * inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

Exemption 7 of the FOIA, as amended, authorizes non-disclosure of "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings * * * (D) disclose the identity of a confidential source, and in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation * * *" 5 U.S.C. (Supp. IV) § 552(b)(7).

OPINION

I

Amway contends that *in camera* review of all withheld documents is essential to determine whether defendants acted lawfully in refusing to produce those documents. However, *in camera* review of withheld documents is "not a necessary or inevitable tool in every case." *EPA* v. *Mink*, 410 U. S. 73, at 93 (1972). While an agency resisting disclosure carries the burden of proof, 5 U. S. C. § 552(a)(3), it can do so by demonstrating the nature of the document by the surrounding circumstances. *EPA* v. *Mink, supra*. The Supreme Court suggested further that "a representative document of those sought may be selected for *in camera* inspection." *EPA* v. *Mink, supra*.

In *Vaughn* v. *Rosen*, 484 F. 2d 820 (1973) ("Vaughn I"), the United States Court of Appeals for the District of Columbia Circuit specified procedures for the government to follow in making such a demonstration. *Vaughn I* set out guidelines for organizing, indexing, and describing allegedly exempt documents, and provided that detailed justifications should accompany and be cross-referenced with the index of the documents. *Vaughn I* further required that these justifications not be overly generalized or conclusory in nature. *Vaughn* v. *Rosen* at 826–828.

In the instant case, the government has followed the procedures outlined in *Vaughn I* by providing a detailed index to the Court in which the documents at issue are indexed in manageable portions and cross-referenced with the government's justifications. The Court, following the suggestion of *EPA* v. *Mink*, has inspected *in camera* those documents which might appear non-exempt, as well as a random sample of other documents to verify the adequacy of the descriptions contained in the index. (See *Ash Grove Cement Co.* v. *F.T.C.*, 511 F. 2d 815 (1975)). Having done so, the Court is satisfied that there are no remaining issues of material fact and that it can rule on these cross-motions without further *in camera* inspection.

II

Amway seeks the names, addresses and other identifying details from two letters written by FTC staff attorney Stuart Cameron in response to correspondence from Amway distributors complaining about certain aspects of their relationship with Amway. These items are exempt under 5 U.S.C. § 552(b)(7)(D) since they are investigatory records compiled for law enforcement purposes and would "disclose the identity of a confidential source". A confidential source is any person who provides information "under an express assurance of confidential-

ity or in circumstances from which such an assurance could be reasonably inferred". See H. Rep. No. 1380, 93rd Cong., 2nd Sess. at p. 13 (1974). Looking at the nature of the material to be disclosed as well as the identity of those who provided that information (*The Title Guarantee Company* v. *National Labor Relations Board*, 78 Civ. 3828, at 17 (S.D.N.Y., Oct. 10, 1975)), it can be reasonably inferred that the source expected to be accorded confidentiality.

These identifying details are also legally withheld under 5 U.S.C. § 552(b)(7)(A) as their release would interfere with enforcement proceedings. If citizens believed that government agencies would disclose their names upon their complaining about possible violations of law, it would have a chilling effect on the government's enforcement activities.

Amway has also requested all records which identify Amway distributors who responded to an FTC request for information. At issue are two letters from Amway distributors in response to letters and other correspondence from the FTC. The Court finds that assurances of confidentiality would be reasonably inferred, since this material was provided in response to a specific written request of the FTC for full cooperation in the investigation of Amway. It is therefore exempt under 5 U.S.C. § 552(b)(7)(D). In addition, one of the two letters withheld provided financial information, including sales statistics, costs, profit and loss statements and copies of federal tax forms. This material in addition to being exempt under the 552(b)(7)(D) exemption, is exempt under 552(b)(4) as "trade secrets and commercial or financial information obtained from a person and privileged or confidential". Under Exemption 4, information is "confidential" if its disclosure is likely to either (1) impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. See *National Parks and Conservation Association* v. *Morton*, 498 F. 2d 765 (1974). In *National Parks* the Court held that since the concessioners were required to provide information sought to be released, public disclosure would not impair the ability of the government to obtain information in the future. *National Parks and Conservation Association* v. *Morton*, at 770. In contrast, the distributors in the instant case were not required by statute to disclose the information requested informally by the FTC.[2] Consequently, the Court finds that disclosure of the letters withheld pursuant to paragraph 3 of the Amway request would impair the government's ability to obtain the information in the future.

[2] While it is true that the FTC might later have subpoenaed the information, this information was provided voluntarily. Such voluntary cooperation with a government investigation is essential to government enforcement proceedings.

III

The majority of the documents in dispute are those responsive to paragraphs 4 through 7, 9 and 10 of the Amway request and withheld by the FTC pursuant to 5 U.S.C. § 552(b)(5), as amended ("Exemption 5"). Exemption 5 authorizes the government to withhold "interagency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." Amway argues that the documents at issue include non-exempt final opinions, non-exempt statements of policy and instructions to staff, and non-exempt segregable factual material.

In support of its position relating to final opinions, Amway argues that the documents and minutes relating to the FTC's "apparent decision" not to act on Amway's complaint alleging staff misconduct in the investigation, the FTC's failure to issue a complaint against Amway in 1973, and the decision to issue a formal complaint against Amway in 1975 were all final non-exempt opinions, citing *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132 (1975). In *Sears* the Supreme Court found that communications explaining the decision of the General Counsel for the National Labor Relations Board ("NLRB") not to issue a complaint on an unfair labor practice charge were non-exempt since the Office of the General Counsel of the NLRB has unreviewable authority to determine whether such a complaint is warranted and has the effect of finally denying relief to the charging party. Conversely, the Court in *Sears* held that communications relating to the General Counsel's decision to issue a complaint fell under Exemption 5 since that decision was not a final disposition of the case. The instant case is not analogous to *Sears*. First, the decision by the FTC not to take formal action on Amway's "complaint" was neither required by nor in response to any formal administrative complaint procedure. This contrasts with the formal statutory procedure by which the NLRB's General Counsel decides whether or not to issue a complaint. Second, the decision not to issue a formal complaint against Amway in 1973 is also dissimilar to the NLRB General Counsel's decision not to issue a complaint, since the FTC's decision did not constitute a "final disposition" of the matter, which in fact remained under active investigation. Unlike the decision of the General Counsel of the NLRB, the 1973 decision of the Commission did not preclude it from taking further action. Finally, the decision of the FTC in 1975 to issue a formal complaint against Amway, like the General Counsel's decision to move forward and issue an unfair labor practice complaint, is not a final opinion but merely one step in the ongoing adjudicatory process before the agency.

Citing *Sears*, *supra* at 153, Amway also argues that some of these

documents are "statements of policy and interpretations which have been adopted by the agency" or "instructions to staff that affect a member of the public" 5 U.S.C. §§ 552(a)(2)(B) and (a)(2)(C) respectively, and therefore, non-exempt. Having examined the documents, the Court finds that documents instructing the staff during the course of this ongoing adjudication fall under Exemption 5. The "instructions to staff" in the documents at issue deal with litigation tactics and investigatory strategy, and are therefore exempt. *EPA* v. *Mink*, 421 U.S. at 160.

Amway's final and strongest argument for disclosure relates to the issue of segregability of factual material included in what might otherwise be deliberative documents. The scope of Exemption 5 is limited by the factual/deliberative test laid out by the Supreme Court in *EPA* v. *Mink* and incorporated in the 1974 amendments to FOIA. In developing this test for non-disclosure under Exemption 5, the Court noted the need to protect the "deliberative or policymaking *processes*" (emphasis added). 410 U. S. at 89. Thus, while factual material in a deliberative document may be non-exempt, it must be "in a form that is severable without compromising the private remainder of the documents." 410 U. S. at 89. See *Montrose Chemical Corporation of California* v. *Train*, 491 F. 2d 63 (1974) and *Washington Research Project, Inc.* v. *Department of HEW*, 504 F. 2d 238 (1974). In both these cases the Court of Appeals emphasizes the deliberative nature of selecting certain facts while omitting others, as well as the deliberative act of choosing to emphasize certain factual material while ignoring other such material.

In applying this test to the FTC documents containing certain factual material, the Court is cognizant of the need to protect this deliberative process. Document 4–5b, a 14–page memorandum from the staff to the Commission discussing the complaint lodged by Amway alleging investigative misconduct, analyzes the merits of the complaint, summarizes Amway's position and arguments, quotes from what the staffer considers "pertinent" portions of correspondence among the parties, emphasizes by underlining other portions of letters and describes meetings with opposing counsel. These narratives and selected facts are deliberative in nature and are intertwined with the analysis. See, *David* v. *Soucie*, 448 F. 2d at 1077. While the Court recognizes that the letters and meeting are not part of a public hearing record (Cf. *Montrose Chemical Corporation, supra)*, it is also significant that it is not material "secreted from public inspection" (See footnote 20, 504 F. 2d at 251). For here the public, i.e. Amway, has access to the letters and has first hand knowledge of summarized meetings as a direct participant in them.

Similarly, document 6(b), a staff memo to the Commission recom-

mending action on the Amway matter, contains narratives intertwined with analysis which if disclosed would compromise the deliberative process. However, the Court does find that page 2 of document 6(b) and paragraph 3 of document 10 are factual and segregable without prejudicing the remainder of the material in those documents.

It is therefore by the Court this 10th day of March, 1976,

Ordered, that plaintiff's motion for summary judgment be, and hereby is, granted as to the material heretofore found segregable and denied as to the remainder, and

Further Ordered, that defendants' motion for summary judgment be, and hereby is, granted except as to those portions found by the Court to be segregable, and

Further Ordered, that defendants shall release the specified material to plaintiff forthwith, except that this order shall be stayed pending an appeal by defendants or until defendants decide not to appeal this order.

So Ordered.

ITT CONTINENTAL BAKING CO., INC. v. FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 75–1218. F.T.C. Docket No. 9000.

(United States District Court, District of Columbia, March 16, 1976)

On motion requesting access to particular documents under the Freedom of Information Act, court deferred *in camera* review of the material pending F.T.C. submission of a more complete and detailed index and fuller evidentiary support for the claimed exemptions.

John H. Schafer, Washington, D.C., for plaintiff.
Julius A. Johnson, Washington, D.C., for defendants.
Before ROBINSON, *District Judge*.

MEMORANDUM AND ORDER

Plaintiff brings this action under the Freedom of Information Act (FOIA) seeking from the Federal Trade Commission access to certain documents which pertain to a complaint issued by the Commission against the Plaintiff. The Government has permitted Plaintiff access to a portion of the file, but has refused as to the remaining documents on the grounds that they are all exempt from disclosure under Exemption 7(A), or, alternatively, that various portions are exempt under Exemptions 4, 5 and 7(D).[1]

The case is currently before the Court on cross motions for summary judgment. The Government supports its motion with an index of the documents withheld and two affidavits from FTC employees familiar with the case currently pending before the Commission. The Court has reviewed these documents and the cases cited in the briefs and concludes that due to inadequacies in the index and the "detailed justification" filed by Defendants, the record is currently not in a posture for resolution of the pending motions.

Under relevant case law, the Government is required to submit a detailed index of the documents sought to be withheld from disclosure.[2] Presumably, the index is to describe the documents with sufficient particularity so that the Court can determine whether the documents must be disclosed by examining both the index and the evidentiary support for the exemptions claimed.

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* Not reported in Federal Reporter. Reported Trade Reg. Rep. ¶ 60,795 at 68,431 (1976–1 Trade Cases).

[1] 5 U.S.C. § 552(b) 4, 5, 7(A) and 7(D).

[2] *Pacific Architects & Eng., Inc.* v. *Renegotiation Bd.*, 505 F. 2d 383 (D. C. Cir. 1974); *Vaughn* v. *Rosen*, 484 F. 2d 820 (D. C. Cir. 1973), cert. denied, 415 U. S. 977 (1974); *Cuneo* v. *Schlesinger*, 484 F. 2d 1086 (D. C. Cir. 1973), cert. denied; *Rosen* v. *Vaughn*, 415 U.S. 977 (1974).

The index filed in this case[3] fails to describe the documents with sufficient itemization and particularity to accomplish this purpose. For example, the documents in Category B are described as "worksheets prepared in anticipation of litigation." There is no definition of the term "worksheet," no itemization of the documents within the category, no explanation of the specific purpose for which they were prepared nor any description of the subject matter of each document. The description is simply too sketchy and conclusory. Similarly, Category C contains "reports of interviews" with a variety of persons. The index fails to itemize the reports, to describe the term "interview report," to indicate with particularity who was interviewed and by whom, or to set forth the subject matter of the interview documents.

There are similar defects in the other categories that need not be detailed by the Court at this time. The FTC is directed to resubmit an index as to all categories in light of the suggestions outlined above.

Similarly, the Court finds the affidavits to be too conclusory and sweeping in light of the various exemptions claimed. The defendants claim that all of the remaining documents in the file are exempt from disclosure by Exemption 7(A), 5 U. S. C. 552(b)(7)(A). This exemption protects from disclosure any investigatory records compiled for law enforcement purposes where release of the documents would interfere with an agency enforcement proceeding. In order to resolve the question of whether this exemption is applicable, the Court must first have sufficient knowledge of the nature of the documents claimed to be withheld (which should have been accomplished by the detailed index) and next the specific reasons why the documents fit into the claimed exemption. The FOIA amendments of 1974 make clear that Exemption 7 is to be narrowly construed.[4] Therefore, as to the documents claimed to be exempt under Exemption 7(A), the Government should set forth the precise reasons why these documents cannot be disclosed in light of the purpose of this exemption. For example, the affidavits should describe the present status of the agency proceeding, specify how each document relates to the case, and explain with particularity any dangers which would be presented by release of the documents at this stage of the proceeding.

The Government also claims that many of these documents are exempt from disclosure under Exemptions 4 and 7(D). Exemption 4 protects trade secrets and commercial or financial information which is privileged or confidential. Exemption 7(D) protects investigatory records for law enforcement purposes which would disclose the identity

[3] The index groups the documents into seven categories: Category A which includes intraagency memoranda, Category B which includes "worksheets" related to the complaint against Plaintiff, Category C which includes "interview reports," Category D which consists of a contract between ITT Continental and a customer, and Category E which includes "correspondence in the Commission's active investigatory file."

[4] 120 Cong. Rec. S. 9329–30 (May 30, 1974).

of a confidential source. The Defendant is directed to *Pacific Architects & Eng., supra* at 385, for a breakdown of what is required to meet the standard of a "detailed justification" for an Exemption 4 claim. Clearly, the affidavit currently before the Court is woefully inadequate in light of the language of this case. And the legislative history of Exemption 7(D) indicates that this exemption is applicable only to the extent the information was provided with an express assurance of confidentiality or under circumstances where same could be inferred.[5] Since Defendant has conceded a lapse of memory on this point of confidentiality, it would appear appropriate that affidavits from at least some of the correspondents would be in order to verify any assurances of confidentiality previously made or to justify the necessity of maintaining a confidential status at this time.

Many of these documents are claimed by the agency to be exempt from disclosure under Exemption 5. This exemption relates to inter-agency or intra-agency memoranda not normally available to an adversary in litigation with the agency. The Court is aware that a random *in camera* review has been suggested as appropriate where this exemption is claimed.[6] However, the Court is of the view that any *in camera* submission should be deferred until the agency has had ample opportunity to submit a more complete and detailed index and evidentiary support for exemptions claimed. See, *Military Audit Project, et al.* v. *Bush*, C. A. 75–2103, Memorandum and Order (D. D. C. March 5, 1976) (Gesell, J.). However, the agency is advised to consider supplementing its detailed justification for this exemption, too, in light of the above discussion.

Based upon the foregoing, it is this 16th day of March, 1976,

Ordered that Defendants shall resubmit within thirty (30) days of this date a detailed index of the documents claimed to be exempt from disclosure under the FOIA and more complete evidentiary support for the exemptions relied upon.

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[5] H. R. Rep. No. 1380, 93rd Cong., 2nd Sess. 12 (1974).

[6] *Ash Grove Cement Co.* v. *FTC*, 511 F. 2d 815 (D. C. Cir. 1975).

GENERAL ELECTRIC COMPANY v. FEDERAL TRADE COMMISSION et al.*

INGERSOLL-RAND COMPANY v. FEDERAL TRADE COMMISSION et al.*

Nos. 75-CV-562, 75-CV-566. F.T.C. File Nos. 99-267, 99-269.

(United States District Court, Northern District of New York, March 23, 1976)

1. STATUTE BASING VENUE ON PLACE OF PLAINTIFF'S RESIDENCE DOES NOT AUTHORIZE ASSERTION OF VENUE IN ANY DISTRICT WHERE PLAINTIFF DOES BUSINESS.

[1004] Fact that corporate plaintiff engages in business in various districts does not entitle such corporation to assert venue, under statute basing venue on residence of plaintiff, in any place where corporation does business.

2. PLAINTIFFS' ACTIONS WOULD BE TRANSFERRED TO DISTRICT COURT WHERE F.T.C.'S ENFORCEMENT PROCEEDINGS WERE ALREADY IN PROGRESS. WHERE F.T.C. HAS AGREED TO WITHHOLD ENFORCEMENT ACTION IN DEFERENCE TO PRESENT SUIT, AND PLAINTIFFS WOULD NOT BE PLACED IN POSITION COMPELLING THEM TO TAKE SIGNIFICANT ACTION OR INCUR PENALTIES BY FAILURE TO COMPLY WITH ORDER.

Where Federal Trade Commission sought no civil penalties from electrical [1005] manufacturers who failed to provide requested information but instead filed enforcement proceeding seeking judicial review of its order, Commission consented to withhold prosecution of such enforcement action in deference to present action brought by manufacturers against Commission, and manufacturers, by failing to obey Commission's order, were not placed in position of being forced either to take significant action under order or to actually incur penalty by refusing to obey order, manufacturers' actions would be transferred to district court where Commission's enforcement proceedings had already commenced.

3. FOR MORE EFFICIENT ADMINISTRATION OF JUSTICE, FEDERAL COURTS HAVE THE RESPONSIBILITY AND POWER TO COORDINATE AND SWITCH CASES ON A NATIONAL SCALE.

Federal courts have power and responsibility to coordinate and switch cases on a national scale, in aid of more efficient administration of justice.

4. INTEGRITY AND EFFICIENCY OF JUDICIAL REVIEW PROCEDURES MANDATED BY F.T.C. ACT REQUIRED THAT MANUFACTURERS' SUBSEQUENT SUITS BE TRANSFERRED TO DISTRICT COURT HEARING ENFORCEMENT PROCEEDING.

Where Federal Trade Commission timely commenced proceeding against electrical manufacturers seeking enforcement of its order to provide Commission with information pursuant to electrical manufacturers form, and Commission forebore seeking statutory penalties against manufacturers, integrity and efficiency of judicial review procedures mandated by Federal Trade Commission

* Reported in 411 F.Supp. 1004.

Act required that manufacturers' subsequent suits against Commission be transferred to district court hearing enforcement proceeding.

5. LARGE MANUFACTURERS, WITH ABUNDANT PERSONNEL AND MONETARY RESOURCES, WOULD NOT BE INCONVENIENCED BY TRANSFER OF PRESENT ACTIONS TO DISTRICT OF COLUMBIA DISTRICT COURT HEARING PREVIOUSLY FILED ENFORCEMENT PROCEEDING.

Where large electrical manufacturers with substantial resources of personnel and money, brought suits against Federal Trade Commission in New York, no significantly greater inconvenience would result from transfer of actions to District of Columbia district court hearing Federal Trade Commission's previously filed enforcement action against such manufacturers.

(Syllabus, with substituted captions, taken from 411 F.Supp. 1004)

On cross motions for injunctive relief and change of venue, court held that, in an effort to reduce the multiplicity of claims, uphold the integrity of the F.T.C. Act, and promote proper judicial administration of federal courts, court would decline jurisdiction and transfer suit to District of Columbia district court hearing previously filed enforcement action of the F.T.C.

Order accordingly.

Weil, Gotschal & Manges, New York City, for plaintiff, General Electric Co.; *Mark A. Jacoby, Roland C. Radice*, Schenectady, N.Y., of counsel.

DiFabio & Couch, P.C., Albany, N.Y., for plaintiff, Ingersoll-Rand Co.; *Martin J. Neville, Joseph W. Burns, Burns, Van Kirk, Greene & Kafer*, New York City, of counsel.

Robert J. Lewis, Gen. Counsel, *Gerald P. Norton*, Deputy Gen. Counsel, *Gerald Harwood*, Asst. Gen. Counsel, Washington, D.C., for defendant, F.T.C. and Commissioners; *Warren S. Grimes, Edward Eitches*, Washington, D.C., of counsel.

James M. Sullivan, Jr., U.S. Atty., Northern District of New York, Syracuse, N.Y., for defendant, Elmer B. Staats, Comptroller General; *Richard K. Hughes*, Asst. U.S. Atty., Albany, N.Y. of counsel.

Before JAMES T. FOLEY, *Chief Judge:*

MEMORANDUM-DECISION AND ORDER

This litigation involves seriously contested issues of jurisdiction, venue and administrative law. The importance of their resolution is evident not only from the vigorous and voluminous submissions of the parties, but also from the point of view of closely related actions in two other federal district courts, as well as the proceeding brought by the defendant Federal Trade Commission (hereinafter "FTC") pursuant to Section 9 of the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.*

in the District of Columbia. (hereinafter "enforcement proceeding"). *See Emerson Electric Co.* v. *F.T.C.*, Civ. No. 75–1173 (E.D.Mo., filed December 29, 1975); *Westinghouse Electric Corp.* v. *F.T.C.*, No. C–1–75–418 (S.D.Ohio, filed November 18, 1975); and *F.T.C.* v. *Emerson Electric Co., et al.*, Misc. No. 76–0002 (D.D.C., filed January 6, 1976).

[1006] The common and central issue in this litigation and in those previously mentioned is the legality of a proposal by the FTC to gather information about the manufacturing and sale of large electrical equipment which is produced by these electrical manufacturing companies. The study, which consists of data gathering, involves the distribution of a form composed of detailed questions and is called the "Economic Report on the Electrical Equipment Manufacturing Industry"; it is known as the Form "EEM". The articulated purpose of the FTC for gathering this data is to obtain information about certain equipment lines manufactured by plaintiffs and other electrical manufacturing companies and to use this information to empirically test the effectiveness of so-called "conduct remedies", e.g., fines, imprisonment, injunctions and treble damages, on the behavior of companies before and after certain anti-trust actions conducted in the 1960's against some of the large electrical equipment manufacturers.

The idea of the EEM questionnaire began on July 24, 1973 with the drafting of a "pretest" Form EEM. This was to be used to test the general feasibility and practicality of the EEM concept. However, it is the final draft of EEM which is at issue and being challenged in this action. *See* Exhibit N_2.

The submissions in this action have been voluminous and many of the same documents have been presented by the various parties to this action. Therefore, the exhibits submitted under the affidavit of Norman F. Heyl, Regulatory Reports Review Officer in the United States General Accounting Office, will be used as they are denominated therein to avoid confusion. This presentation of documents is complete and well organized for reference. Documents submitted by other parties and referred to herein will be so designated.

On June 27, 1975, the FTC pursuant to its procedures [*see* 16 C.F.R. § 2.12] approved and adopted this final Form EEM and ordered approximately forty-four major electric manufacturers to complete it; this order included the plaintiffs herein, the General Electric Company and the Ingersoll-Rand Company (hereinafter "GE" and "I–R" respectively). It is important to note that the pretest version of Form EEM was submitted to six manufacturers concerning its feasibility. However, after the motion was filed by GE with the FTC to quash that order for use of the form, the proposal to use pretest Form EEM was discontinued.

The final Form EEM, in issue here, was submitted on October 17,

1974, to the Government Accounting Office (GAO) pursuant to the Federal Reports Act, 44 U.S.C. §§ 3501–3512 (Supp. IV) for the mandated approval by the Comptroller General. The Comptroller General must determine, under § 3512, whether any governmental agency form (1) avoids duplication of effort in gathering information which might be already possessed by other independent regulatory agencies and (2) minimizes the compliance burden on business enterprises and other persons. Such screening, of course, designed for these worthy purposes, is an important legislative provision. *See* 44 U.S.C. § 3512(b)(1) and (2). Significantly, this review by the Comptroller General is not the ultimate determinant of forms used by the agency because:

> the independent regulatory agency shall make the final determination as to the necessity of the information in carrying out its statutory responsibilities and whether to collect such information. 44 U.S.C. § 3512(d).

Although this review by the Comptroller General must be normally completed within forty-five days, extensions were agreed to by the GAO and the FTC concerning Form EEM. *See* Exhibit D. The decision by the Comptroller General is one committed to his discretion as the statute characterizes his response to the agency as "advice."

Certain changes were made in Form EEM pursuant to suggestions by the [1007] GAO and certain electrical companies, including GE. Form EEM was then advised to be in compliance with the Federal Reports Act by letter from the GAO dated May 23, 1975, with the suggestion made therein that the FTC and the companies subject to complying with Form EEM meet to discuss and resolve some of the problems in providing data which, in some instances, would be up to twenty years old. *See* Exhibit M. Although some meetings were held, no mutual resolutions were forthcoming.

The plaintiffs herein were served with an order to comply with Form EEM in approximately June and July of 1975. The completed EEM was supposed to be filed with the FTC in or around September 1975. Both plaintiffs filed motions before the FTC to quash this order on July 18, 1975 on the grounds that Form EEM was burdensome, duplicative and violative of privileges of confidentiality; these motions were denied by the FTC on October 23, 1975.

The Form EEM was completed by twenty-seven companies and eleven companies were dropped because they did not manufacture equipment related to the survey. Four companies have not complied with the order, those being GE and I–R, plaintiffs herein, and the plaintiffs who have commenced the two other federal court actions mentioned previously. The statutory enforcement proceeding pursuant to Section 9 of the Federal Trade Commission Act was timely

commenced against these four electrical companies by the FTC on January 6, 1976 in the District of Columbia. This was four days after the last deadline for submission of EEM by the Emerson Electric Co. on January 2, 1976. It is important to point out that although authority exists for the imposition of penalties against these companies that have failed to file EEM within the allotted time, the FTC has not engaged the procedure to obtain such penalties, seeking instead to use the judicial review procedure of Section 9 of the Federal Trade Commission Act. *See also* Section 10, 15 U.S.C. § 50.

On November 20, 1975, GE commenced one of the instant actions in this District Court (75–CV–562) and on November 24, 1975, I–R commenced the other separate one (75–CV–566). Both these actions were commenced well before the final deadline for the filing of Form EEM by the Emerson Electric Co., one of the companies served with Form EEM, and thus before the FTC could reasonably have commenced an enforcement proceeding against all those companies who would not be in compliance. Both of the instant actions are largely identical and the plaintiffs have adopted a common strategy and indeed relied upon each others papers and other submissions and oral argument to a considerable degree. With the exception of a venue question effecting only I–R, discussed *infra*, this decision will not differentiate among the legal challenges made in the two actions.

The complaint is brought pursuant to numerous jurisdictional statutes. However, it is not the availability of jurisdiction which is at issue but rather whether jurisdiction should be exercised in these actions. Statutes relied upon as cited in the complaint and relevant to the decision here are: the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.*, the Federal Reports Act, 44 U.S.C. §§ 3501 *et seq.*, the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, the jurisdictional statutes alleged are: 28 U.S.C. §§ 1331, 1337, 1361, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. The substantive claims made are that: (1) the Form EEM is burdensome, vague and ambiguous in violation of the United States Constitution and statutes; (2) Form EEM was promulgated outside the authority of the FTC; (3) the Comptroller General and Government Accounting Office failed to carry out statutory duties in relation to Form EEM, especially pursuant to the Federal Reports Act; (4) the FTC failed to follow the proper rule making procedure mandated by the Administrative Procedure Act; (5) the Form EEM violated confidential privileges; and (6) Form EEM failed to comply with regulations promulgated under the Budget and [1008] Accounting Procedure Act of 1950, 31 U.S.C. § 18b. The relief of declaratory judgment and a permanent injunction are sought essentially to void Form EEM and prohibit its use presently and in the future against the plaintiffs.

The motions presently before the Court are by the FTC and the Comptroller General to dismiss these actions without prejudice under the Federal Rules of Civil Procedure 12(b) for want of equity in this action and the existence of an adequate remedy at law elsewhere, namely, the enforcement proceeding in the United States District Court for the District of Columbia. Alternatively, defendants move to transfer these actions to the District of Columbia Court pursuant to 28 U.S.C. §§ 1404(a) and 1406(a) or to stay these actions pending the completion of the enforcement proceeding in the United States District Court for the District of Columbia. The Comptroller General has also moved for summary judgment pursuant to F.R.Civ.P. 56.

The plaintiffs have each filed motions for an injunction to prevent the FTC from pursuing the enforcement proceeding in the District of Columbia and also compelling the FTC to present the claims made in their enforcement proceeding in the instant action as compulsory counterclaims. *See* F.R.Civ.P. 13(a). However, by letter dated March 4, 1976, from counsel for GE, this Court was informed that no motion for a preliminary injunction would be filed in light of an assurance by the FTC that further action in the enforcement proceeding would be withheld for a period of three weeks. These motions were argued on March 1, 1976. Although no communication has been received on behalf of I–R in this regard, it is presumed that this delay period offered by the FTC would also obviate the need for such relief in I–R's action as well.

It is my judgment after review that has to be made hastily during a jury trial session, that the interests of justice will best be served by transferring the instant actions to the United States District Court for the District of Columbia where the enforcement proceeding has already been brought. The action commenced by GE is transferred pursuant to 28 U.S.C. § 1404(a); the I–R action is transferred pursuant to 28 U.S.C. § 1406(a) since, in my judgment, venue is improperly laid in this district.

[1] Plaintiff, I–R argues that 28 U.S.C. § 1391(e)(4)—venue based on the residence of the plaintiff—can be any place where the company does business, because, pursuant to subsection (c), a corporate-defendant's residence is anywhere the corporation does business. I do not think that the definition of subsection (c) can be so easily transposed on subsection (e)(4) because their purposes and subjects are very different. Subsection (c) deals particularly and only with corporations as defendants while subsection (e)(4) refers generally to plaintiffs without any reference or allusion to corporate status. In any event, I–R is neither a corporate-defendant in the instant action, nor under any reasonable definition, does it reside in every district where it does

business. Judge Friendly has clearly rejected the argument that gives a corporate-plaintiff greater venue options than a natural person:

> we find it exceedingly hard to believe Congress had any idea that by enacting § 1391(c) it was allowing a corporation which did business in a multitude of districts to sue in any of them irrespective of the residence of the defendant, although a natural person similarly doing business in a number of districts could sue only in the district of his residence or in that of the defendant. * * * we see no reason to suppose that Congress did not consider that the four venue choices afforded under § 1391(e) would suffice even though a plaintiff corporation remained a "resident" of only the chartering state.

Manchester Modes, Inc. v. *Schuman*, 426 F.2d 629, 632–633 (2d Cir. 1970).

This holding is fortified by the subsequent opinion of the Court of Appeals, Second Circuit, in *Natural Resources De*[1009]*fense Coun.* v. *Tennessee Valley Authority*, 459 F.2d 255, 257 (2d Cir. 1972) which characterized such a broad interpretation of the scope of subsection (e) as advocated by I–R here as "a result apparently so eccentric, the court [below] fell into error by treating that section simply as a text to be parsed with such aid as the dictionary and grammar afford and without adequately considering the history of the statute and the evil it was designed to cure." *See also American Cyanamid Co.* v. *Hammond Lead Products, Inc.*, 495 F.2d 1183, 1184–85 (3rd Cir. 1974); *cf. Pure Oil Company* v. *Suarez*, 346 F.2d 890, 892 and 897 (5th Cir. 1965), *aff'd*, 384 U.S. 202, 86 S.Ct. 1394, 16 L.Ed.2d 474 (1966); *Time, Inc.* v. *Manning*, 366 F.2d 690, 696 n. 7 (5th Cir. 1966).

As previously mentioned, jurisdiction over the subject matter is not contested and would properly be exercised under certain circumstances in this Court in a preenforcement action for this "was the very purpose of the Declaratory Judgment Act * * *" *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 152, 87 S.Ct. 1507, 1517, 18 L.Ed.2d 681, 693 (1967). The real issue here is whether it is appropriate and sensible for this Court *to exercise* its jurisdiction in the context of the facts here and the situation of filings in several courts with similar issues. *See General Motors Corporation* v. *Volpe*, 457 F.2d 922, 923 (3rd Cir. 1972).

The recent decision of the Court of Appeals, Third Circuit, in *A. O. Smith* v. *Federal Trade Commission*, 530 F.2d 515, 44 U.S. Law Week 2402 (1976), is heavily relied upon by plaintiffs to support the exercise of jurisdiction by this Court. Realizing that the holding of the Third Circuit was principally in reversing the grant by the district court of a preliminary injunction issued against FTC action, it should not be thereby inferred that the mere retention of jurisdiction over that litigation has great precedential value in the instant action. This is particularly so in light of significant distinctions in the factual circumstances of both *A. O. Smith* and *Abbott Laboratories* when compared with the case at bar in terms of satisfying the test for

exercising jurisdiction in preenforcement actions. The Court of Appeals in *A. O. Smith* said that:

> it appears from the *Abbott Laboratories* trilogy that one seeking discretionary relief may not obtain pre-enforcement judicial review of agency action if there is no immediate threat of sanctions for noncompliance, or if the potential sanction is de minimis. 530 F.2d at 524.

It is my judgment that the action and order of the FTC issuing the Form EEM threatens neither plaintiff with immediate sanctions for noncompliance with Form EEM. As District Judge Weinfeld recently observed:

> Under section 10 of the Federal Trade Commission Act, daily fines for failure to file reports such as the LB Form do not begin to accrue until 30 days after a default notice is issued. Default notices by themselves carry no adverse consequences, and there is therefore no need to enjoin their issuance. If any company receives a default notice, it will have ample time to seek the court's protection before suffering any injury. It should also be noted that the Commission may decide to enforce its Order without resort to default notice and the threat of consequent fines.

Aluminum Co. of America v. *F.T.C.*, 390 F.Supp. 301, 309 (S.D.N.Y.1975); *see also Genuine Parts Company* v. *F.T.C.*, 445 F.2d 1382, 1392 (5th Cir. 1971).

From the instant actions, it is apparent that the FTC has sought no civil penalties under Section 10 [15 U.S.C. § 50] by issuance of any default notice, but has itself only sought judicial review of the legality of the order by a section 9 [15 U.S.C. § 49] enforcement proceeding. It has, as previously mentioned, consented to withhold prosecution of the enforcement action in deference to the motions filed in the actions here and elsewhere. Thus, the dilemma in *A. O. Smith* and that which the United States Supreme [1010] Court sought to ameliorate in *Abbott Laboratories*—where a company is compelled to make a Hobson's choice before judicial review can be sought in either altering the conduct of its affairs to a significant degree pursuant to an agency order, or refusing to obey the order and thereby risking civil fines and penalties—is not present here. *See also United States* v. *Morton Salt Co.*, 338 U.S. 632, 654, 70 S.Ct. 357, 369, 94 L.Ed. 401, 416–417 (1950). Here, not only are no fines impending against plaintiffs but significantly judicial review is being sought by the agency itself. Additionally, the circumstances in both *Abbott Laboratories* and *A. O. Smith* each involved an agency order which necessitated permanent and serious changes in the conduct of the affairs of the companies subject to the order: in *Abbott Laboratories* it involved permanent changes in the labeling of drugs; and in *A. O. Smith* an order which would require an *annual* accounting report.

The case at bar involves an order for only one compilation of data i.e., for answers to an extensive form questionnaire. In this sense it imposes no long term change in the conduct of plaintiffs such as a staff to generate an accounting report annually, or the mechanical and other changes associated with changing the labeling on products. Whether, as a single report, the EEM is burdensome in length or scope is not an important issue in determining whether there is impending injury sufficient to justify preenforcement by this Court. The issue is simply whether plaintiffs are forced to either take significant action or actually incur penalties by refusing to obey the order before a court of law is able to adjudicate legal challenges to the order. Plaintiffs here, in my judgment, are forced to take no action at this time with respect to the EEM, nor are they suffering any penalties for their present inaction on EEM. The obligation of EEM is finite; it would end, at least in this phase of the study, with the providing of the information, and this imposes no permanent changes on the corporate behavior or in the business operations of the plaintiffs. *Compare, St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 225–226, 82 S.Ct. 289, 299–300, 7 L.Ed.2d 240, 252–253 (1961).

[2] Of course, the most salient point is that judicial review is precisely what is being sought by the FTC's instant motions and hence it is conceivable that, under somewhat different circumstances, dismissal of the instant actions without prejudice would be the appropriate relief. However, other facets of this litigation make it more appropriate, to my mind, for transfer to the United States District Court for the District of Columbia where the enforcement proceeding has already commenced. The United States Supreme Court, in responding to a suggestion in *Abbott Laboratories* that the specter of multidistrict litigation would allow preenforcement litigation to paralyze agency action, proposed a solution short of locking the courthouse doors to such suits:

> The short answer to this contention is that the courts are well equipped to deal with such eventualities. The venue transfer provision, 28 U.S.C. § 1404(a), may be invoked by the Government to consolidate separate actions.

Id., 387 U.S. at 154–155, 87 S.Ct. at 1519, 18 L.Ed.2d at 695.

The circumstances which the Supreme Court had in mind exists in the present actions, in my judgment. There are now pending four plenary actions in three different United States District Courts at this time as well as the statutory enforcement proceeding pending in the District of Columbia. All of these actions involve essentially the same issue, to wit, the legality of the Form EEM.

[3] Federal courts have the power and, indeed, the responsibility to

coordinate and switch cases on a national scale in the aid of the more efficient administration of justice. *Hall* v. *E. I. DuPont De Nemours & Co., Inc.*, 345 F.Supp. 353, 384–85 (E.D.N.Y.1972); *see Farbenfabriken Bayer, A.G.* v. *National Distill. & C. Corp.*, 324 F.Supp. 156, 158 (S.D.N.Y.[1011]1971); *Securities and Exchange Commission* v. *First Nat. Finance Corp.*, 392 F.Supp. 239, 241 (N.D.Ill., E.D.1975); *Jacobs* v. *Tenney*, 316 F.Supp. 151 (D.Del. 1970). It is a tested and efficient policy that works well to put together in one District Court issues of similarity and thus reduce a proliferation of judicial decision making A transfer will promote the speedy and efficient determination of the issues of this litigation as well as avoid inconsistent judgments and their repercussions if appeals are then taken. Such purposes are similar to those that underlie the statute allowing consolidation of multidistrict litigation. *See* 28 U.S.C. § 1407.

[4] Furthermore, in light of the timely enforcement proceeding commenced by the FTC and their forbearance from seeking statutory penalties, it is my firm judgment, that preserving the integrity and efficiency of the judicial review procedure mandated by Congress in the Federal Trade Commission Act is of equal importance in supporting an order of transfer. *Federal Trade Commission* v. *Claire Furnace Company*, 274 U.S. 160, 173-74, 47 S.Ct. 553, 556, 71 L.Ed. 978, 981–982 (1927); *cf. Weinberger* v. *Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975); *Dunlop* v. *Bachowshi*, 421 U.S. 560, 566–68, 95 S.Ct. 1851, 1857–1858, 44 L.Ed.2d 377, 386–387 (1975). The Federal Trade Commission, or any regulatory agency for that matter, could not conduct its statutory responsibilities efficiently if it were forced to litigate its orders again and again throughout the nation by full plenary proceedings with numerous appeals to follow. Such circumstances are particularly inappropriate when the FTC itself has sought enforcement of its orders by the statutory section 9 enforcement action which has fewer procedural and pretrial tangles and which was specifically created by Congress for such purposes. *See Hannah* v. *Larche*, 363 U.S. 420, 446–448, 80 S.Ct. 1502, 1516–1518, 4 L.Ed.2d 1307, 1323–1325 (1960).

The plaintiffs argue that the enforcement proceeding pending in the District of Columbia is inadequate to protect their rights for three reasons: (1) it is not a full plenary proceeding with complete discovery and other pretrial procedures; (2) it does not involve the Comptroller General as a party defendant as the instant litigation does, hence the claims made against him will not be resolved; and (3) the District of Columbia is an inconvenient forum for the plaintiffs and their witnesses and records. In my judgment, rather than militating against transfer, these arguments at least in part support a decision to transfer.

The plaintiffs can hardly complain that the enforcement proceeding will give them a speedier determination than would be available here, unless it is understood that the plaintiffs are in no hurry to risk a decision which would compel compliance with Form EEM. If certain discovery procedures or other pretrial devices are necessary for a fair adjudication, plaintiffs may apply for consolidation of this action with the enforcement proceedings, or petition the court there for leave to have discovery of any relevant materials. Similarly, request could be made to join the Comptroller General as a party in the enforcement proceeding or he would become a party if consolidation were granted joining the instant actions with the enforcement proceeding. Under these circumstances, the plaintiffs' interest in litigating certain legal issues against the Comptroller General would be satisfied. In any event, it has been stated by a distinguished District Judge that the claims made by plaintiffs could be advanced as defenses in the enforcement action thereby assuring full adjudication of all related legal issues. *See Aluminum Co. of America* v. *F.T.C.*, supra, 390 F.Supp. at 309.

[5] Finally, there is little persuasiveness to the claims that these companies, with substantial resources of personnel and money, would be unduly inconvenienced by traveling to Washington, D.C., to participate in the enforcement proceeding. *Cf. A. O. Smith* v. *F.T.C.*, *su*[1012]*pra*. In this regard it is interesting to note that I–R is a corporation based in the State of New Jersey and as such apparently finds no inconvenience in litigating their claims in this Northern District which is located in Albany, New York. In my judgment, Washington, D.C. presents no significantly greater inconvenience in these days of modern travel means for I–R than they sought to impose upon themselves in the instant action.

In conclusion, the pending enforcement proceeding having been promptly commenced by the Federal Trade Commission and the absence of either a pending accrual of statutory penalties or the compulsion of an order calling for significant changes in the manner in which a company conducts business, the exercise of jurisdiction on the merits is inappropriate in the instant actions. However, the multiplicity of actions in this and other district courts which all involve essentially similar claims would more properly be litigated in the enforcement proceeding now pending in the United States District Court in the District of Columbia. Such a transfer would promote proper judicial administration of the federal courts, preserve the integrity of the administrative and statutory review procedures mandated by Congress, and generally further the interests of justice.

As remarked by Mr. Justice Douglas, "Common sense often makes good law." *Peak* v. *United States*, 353 U.S. 43, 46, 77 S.Ct. 613, 615, 1

L.Ed.2d 631, 635 (1957). In my judgment, the common sense solution to the problems of the instant litigation and the other actions currently pending elsewhere is to place it in the District of Columbia where a more unified, orderly and expeditious judicial determination may be had and in the same process the integrity of the administrative process of the Federal Trade Commission may be preserved. There is thus little loss to the parties and a great deal to be gained by the judicial system by one adjudication on the legality of EEM.

The motions of defendants to transfer these actions to the United States District Court for the District of Columbia are granted pursuant to 28 U.S.C. § 1404(a) with respect to the GE action, 75–CV–562, and pursuant to 28 U.S.C. § 1406(a) with respect to the I–R action, 75–CV–566. In light of the transfer of these actions to the United States District Court for the District of Columbia, the motions of the plaintiffs for injunctions are hereby denied.

The alternate relief requested in the motions of defendants to transfer being hereby granted, their motions for dismissal of the instant actions without prejudice or staying the actions is hereby denied. However, this order of transfer of both actions is stayed until March 30, 1976, and then to expire, in order to allow plaintiffs sufficient time, if they be so advised, to file a notice of appeal and to apply to the Court of Appeals, Second Circuit, for further stay pursuant to the Federal Rules of Appellate Procedure 8(a).

It is so Ordered.

FEDERAL TRADE COMMISSION v. JOHN D. MacARTHUR and BANKERS LIFE AND CASUALTY CO.*

Nos. 75–1700, 15–1701. F.T.C. File No. 99–240

(United States Court of Appeals, Seventh Circuit, April 1, 1976)

1. WHERE STEPS TAKEN BY F.T.C. INDICATE THAT AN INQUIRY WAS BEING CONDUCTED WITHIN THE DISTRICT, DISTRICT COURT HAD JURISDICTION OVER F.T.C. PETITION FOR SUBPOENA ENFORCEMENT.

[1136] District court for the Northern District of Illinois had subject matter jurisdiction over Federal Trade Commission's petition for an order requiring respondents to honor a subpoena duces tecum issued by the Commission pursuant to section of Federal Trade Commission Act, where steps taken by Commission in its effort to obtain documents were sufficient to show that an inquiry was being conducted within district, even though other Commission offices were involved in investigation and even though subpoena emanated from Commission's Kansas City office, with the return to be at its Chicago Office.

2. TO ASCERTAIN IF F.T.C. INVESTIGATION HAS BEEN UNDERTAKEN IN A PARTICULAR PLACE, TEST IN DETERMINING DISTRICT COURT ENFORCEMENT JURISDICTION IS WHETHER THE PLACE AND ACTIVITIES OCCURRING THERE REASONABLY RELATE TO THE SUBJECT MATTER OF THE INQUIRY.

For purpose of section of Federal Trade Commission Act conferring enforcement jurisdiction on a district court within whose jurisdiction inquiry is carried on by the Commission with respect to enforcement, the test as to whether the Commission is undertaking an inquiry in a particular place is whether that place and the activities occurring there bear a reasonable relation to the subject matter of the investigation, and factors such as the convenience of the Commission, the location of documents and witnesses, and the corporate headquarters of investigated party are relevant, particularly when the only action taken by the Commission is a request for information.

3. DECISION AS TO WHERE TO CONDUCT AN INQUIRY AND WHERE TO INVOKE THE SUBJECT MATTER JURISDICTION OF A SPECIFIC DISTRICT COURT FALLS WITHIN THE BROAD INVESTIGATORY POWERS GRANTED TO F.T.C. BY CONGRESS.

Congress has given the Federal Trade Commission broad investigatory powers, and consistent with those powers is the power of the Commission to decide where to conduct an inquiry and where to thereby invoke the subject matter jurisdiction of a particular district court under the Federal Trade Commission Act.

4. F.T.C. IS NOT REQUIRED TO GO TO EACH JURISDICTION WHERE DOCUMENTS ARE LOCATED TO OBTAIN SUBPOENA ENFORCEMENT, SINCE IT IS EMPOWERED BY STATUTE TO SECURE PRODUCTION OF DOCUMENTS ANYWHERE AND AT ANY PLACE IN THE UNITED STATES IT DESIGNATES.

Under section of Federal Trade Commission Act which allows the Commission to require the production of records from anywhere in the United States at any

* Reported in 532 F.2d 1135 (1976).

designated place of hearing, the Commission is not required to go to each jurisdiction where documents are supposedly kept to secure enforcement of a subpoena.

5. UNDER FED. RULES CIV. PROC., DISTRICT COURT, IN ENFORCEMENT PROCEEDINGS, IS NOT OBLIGATED TO TAKE TESTIMONY FROM WITNESSES OR HOLD EVIDENTIARY HEARINGS IN ALL SITUATIONS AND CASES.

In an enforcement proceeding under the Federal Trade Commission Act, the district court is not required by Federal Rules of Civil Procedure to hold an evidentiary hearing in all cases, nor does "due process" require that the court take the testimony of witnesses in all situations.

6. RESPONDENT CARRIES BURDEN OF DEMONSTRATING INSUFFICIENCY OF PETITION IN A SUMMARY ENFORCEMENT PROCEEDING.

In a summary enforcement proceeding under the Federal Trade Commission Act, the burden is on the respondent to demonstrate the insufficiency of the petition.

7. RESPONDENT MUST SHOW DISPUTED QUESTIONS OF FACT BEFORE THE DISTRICT COURT NEED HOLD EVIDENTIARY HEARING IN SUMMARY ENFORCEMENT PROCEEDING.

[1137] Before the district court need hold an evidentiary hearing in a summary enforcement proceeding under Federal Trade Commission Act, the respondent must show that there are disputed questions of fact whose resolution would warrant refusing enforcement of the subpoena.

8. COURT'S REFUSAL TO GRANT EVIDENTIARY HEARING WAS PROPER SINCE RESPONDENT OFFERED NO FACT TO INDICATE SUBPOENA COMPLIANCE WOULD BE UNDULY BURDENSOME, OR THAT SOUGHT MATERIAL WAS IRRELEVANT TO PROPOSED INVESTIGATION.

In summary enforcement proceeding under Federal Trade Commission Act, respondent failed to show that there were disputed questions of fact whose resolution would warrant refusing enforcement of subpoena, as respondent offered no facts to show either that complying with the subpoena would be unduly burdensome or that the material sought was clearly irrelevant to the proposed investigation, so that, despite contentions that, inter alia, district court did not have subject matter jurisdiction, refusal to grant evidentiary hearing was appropriate.

9. RESPONDENT'S ROLE IN LAND SALE TRANSACTIONS WAS AN ISSUE TO BE DETERMINED BY F.T.C., NOT AT A HEARING FOR SUBPOENA ENFORCEMENT.

Issue as to whether respondent was only mortgagee and financier in questioned land sales transactions and whether respondent never engaged in offer or sale of land itself presented questions for the Federal Trade Commission, and were not to be determined at adversary hearing on petition filed by Federal Trade Commission for order requiring respondent to honor subpoena duces tecum issued by the Commission.

10. RESPONDENT'S ASSERTION THAT IT WAS MERELY MORTGAGEE AND FINANCIER IN QUESTIONED LAND SALES DID NOT PROVIDE DEFENSE TO PETITION FOR SUBPOENA ENFORCEMENT.

Even if respondent's role in questioned land sales was only that of a mortgagee and financier, that in itself did not provide defense to petition for order requiring respondent to honor subpoena duces tecum issued by Federal Trade Commission.

11. F.T.C. ACT AUTHORIZED ANY DISTRICT COURT TO ENFORCE SUBPOENA

AND USE CONTEMPT SANCTIONS REGARDLESS OF WHERE SOUGHT DOCUMENTS WERE LOCATED.

Under section of Federal Trade Commission Act authorizing Commission to secure production of documentary evidence from any place in the United States and to invoke the aid of any district court in the United States in case of disobedience to a subpoena, district court was authorized to enforce subpoena with respect to documents outside Northern District of Illinois and district court had the authority to use contempt sanctions without regard to the location of the documents sought by the Commission.

12. DISTRICT COURT ORDER PROHIBITING F.T.C. FROM DISCLOSING SUBPOENAED INFORMATION WAS UNNECESSARY IN VIEW OF SANCTIONS PROVIDED IN THE F.T.C. ACT FOR UNAUTHORIZED DISCLOSURE OF INFORMATION RECEIVED BY THE AGENCY.

District court order prohibiting Federal Trade Commission from disclosing information obtained through subpoena to public except in connection with a public proceeding was not warranted, in light of sanctions provided in section of Federal Trade Commission Act for unauthorized disclosure of information obtained by the Commission.

13. COURT MUST CONSIDER, UNDER STATUTE AUTHORIZING TRANSFER OF PROCEEDINGS FROM ONE DISTRICT TO ANOTHER, THE CONVENIENCE OF PARTIES AND WITNESSES, TRANSFER COSTS, PUBLIC INTEREST INVOLVED, AND PARTICULAR CIRCUMSTANCES PRESENTED IN EACH CASE; EACH CASE MUST BE EXAMINED ON ITS OWN FACTS.

Under statute authorizing transfer of proceedings from one district court to another, the district court is to weigh, among other factors, the convenience of the witnesses and the parties, the costs of the transfer, the public interest involved and any special circumstances present in the case, and each must be examined on its own facts.

14. AN ACTION SHOULD NOT BE SPLIT BETWEEN TWO DISTRICTS IN ORDER TO AVOID DUPLICATION AND POSSIBLE CONFLICTS BETWEEN TWO DISTRICT COURTS.

In order to avoid duplications and possible conflicts between two district courts, an action should not be split between two districts.

15. SINCE F.T.C. ACT GRANTS DISTRICT COURT AUTHORITY OVER DOCUMENTS LOCATED ANYWHERE IN THE UNITED STATES, COURT ORDERING TRANSFER TO SOUTHERN DISTRICT OF FLORIDA THAT PORTION OF THE CASE DEALING WITH RECORDS LOCATED THERE, WAS UNWARRANTED.

District court order transferring portions of case involving petition of Federal Trade Commission for order requiring respondents to honor subpoena duces tecum issued by Commission to Southern District of Florida with respect to that portion of the case dealing with records located therein was not warranted in light of district [1138] court's authority under Federal Trade Commission Act over documents located within United States, regardless of where within the United States the documents are located.

(Syllabus, with substituted captions, taken from 523 F.2d 1135)

On appeal from district court order requiring compliance with F.T.C. subpoena duces tecum, court held that statute granted subject matter jurisdiction to district court; evidentiary hearing was properly refused; respondent's assertion that it was merely a mortgagee and financier in investigated transactions was no defense to Commission's petition; where F.T.C. Act provided sanctions for unauthorized disclosure of documents received by the Commission, order prohibiting divulgence of information obtained by subpoena was unnecessary and improper; and since district court had subpoena enforcement power regardless of location of documents sought, order would be modified to obviate any Florida proceedings.

Affirmed in part; and reversed in part.

William T. Kirby, Chicago, Ill., *Donald A. Derfner*, New York City, for MacArthur.

Gerald Harwood, Asst. Gen. Counsel, F.T.C., *Denis E. Hynes*, Atty., Washington, D.C., for Federal Trade Commission.

Before SWYGERT and CUMMINGS, *Circuit Judges*, and EAST, *Senior District Judge*, District of Oregon, sitting by designation.

CUMMINGS, *Circuit Judge*.

In June 1975, the Federal Trade Commission filed a petition for an order requiring John D. MacArthur and Bankers Life and Casualty Company[1] to honor a subpoena *duces tecum* issued by petitioner on October 1, 1974. The proceeding was filed pursuant to Section 9 of the Federal Trade Commission Act.[2]

In 1973, the Commission decided to conduct a non-public investigation to determine whether Bankers and others (apparently Bankers' affiliates and subsidiaries) were engaging in unfair or deceptive acts or

[1] The corporate respondent was added by the Federal Trade Commission's motion to amend the pleadings which was granted on June 25, 1975.

[2] Section 9 of the Federal Trade Commission Act provides in pertinent part (15 U.S.C. § 49):

"That for the purposes of this [Act] the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purposes of examination, and the right to copy any documentary evidence of any person, partnership or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership or corporation, issue an order requiring such person, partnership or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

. . . . . .

practices in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) in connection with the sale of subdivided land in Colorado.

In October 1974, a subpoena *duces tecum* was served upon respondents requiring them to testify and produce specified documents at an investigational hearing before a representative of the Commission in Chicago on November 4, 1974. Through negotiations of counsel, the return was reset for February 1975 in Lake Park, Florida, for the convenience of respondents and substituted Bankers' vice president, W. L. Cargill, for MacArthur on the ground that Cargill was more knowledgeable about the documents to be produced.

At the Florida investigational hearing, Bankers refused to submit documents responsive to Specifications 4(d), 4(e) or 5 of the subpoena on the ground that they were beyond the scope of the investigation. Only an unsworn copy of "certain" resolutions of the investment committee of Bankers' Board of Directors was submitted in response to Specification 4(c). Although other documents were produced, Mr. Cargill was unable to furnish much information about them.

The Commission then filed suit to enforce the subpoena, requesting the district court **[1139]** to direct respondents to appear before a duly designated representative of the Commission "at a date, time and place to be determined by petitioner; and then and there to testify and produce all of the books, papers, documents and other materials called for by Specifications 4(c), 4(d), 4(e), and 5 of the said subpoena *duces tecum*."

On June 25, 1975, the district court ordered the respondents to appear before it on July 8 to show cause why the Commission's petition should not be granted. On that date, Bankers appeared before Judge Will and denied that the court had subject-matter jurisdiction over the controversy. Alternatively, Bankers filed a motion to transfer the case to the United States District Court for the Southern District of Florida. The supporting affidavit of a New York lawyer for Bankers showed that Bankers' executive office for MacArthur, then 78 years old, was in Palm Beach County, Florida, where he maintained his residence. The affiant also stated that respondents intended to produce six Florida residents in opposition to the petition, that the Commission was expected to produce witnesses from its Kansas City, Missouri, regional office, and that no Chicago witnesses would be expected to appear. The affidavit also stated that substantially all the documentary evidence which respondents intended to introduce at the hearing on the petition was located in Bankers' Florida offices.

At the conclusion of oral arguments made by counsel for the parties on July 8, Judge Will ordered that Bankers comply fully with the Commission subpoena and appear before a representative of the

Commission at a date, time and place to be determined by the Commission and produce all the documents called for by Specifications 4(c), 4(d), 4(e) and 5 located within the Northern District of Illinois and to give such testimony as might be required by the Commission in connection therewith. The district judge also ordered Bankers not to remove such records from the Northern District of Illinois. It transferred the portion of the case dealing with the records of MacArthur and the records of Bankers located out of the Northern District of Illinois to the United States District Court for the Southern District of Florida and further ordered that "no information obtained pursuant hereto be disclosed to the public except in connection with a public proceeding." Finally, Bankers' application for an evidentiary hearing was denied.

Thereafter the Commission appealed the district court's order to the extent it refused the production of documents beyond the confines of the Northern District of Illinois and to the extent that it contained a protective clause. Bankers cross-appealed, challenging the jurisdiction of the court and arguing that the court erred in denying its application for an evidentiary hearing and its motion to transfer the whole cause to the Southern District of Florida. The district court's order was subsequently stayed in its entirety pending this appeal.

Jurisdiction of District Court

Bankers first urges that the district court lacked subject-matter jurisdiction because paragraph 3 of Section 9 of the Federal Trade Commission Act (note 2 *supra*) only confers enforcement jurisdiction on a district court "within the jurisdiction of which such inquiry is carried on," whereas, Bankers claimed, no inquiry was being carried on within the Northern District of Illinois. We reject that argument.

Section 3 of the Federal Trade Commission Act empowers the Commission to "prosecute any inquiry necessary to its duties in any part of the United States" (15 U.S.C. § 43), and Section 6(a) of the Act empowers it to "gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any * * * corporation engaged in or whose business affects commerce * * * and its relation to other persons, partnerships and corporations" (15 U.S.C. § 46(a)). The Commission's resolution of November 6, 1973, defined the nature and scope of its investigation as being "To determine whether or not various sellers of subdivided **[1140]** land and others may have been or may now be engaged in unfair methods of competition" in violation of Section 5 of the Federal Trade Commission Act. The investigation was not limited to any particular judicial district, and the Commission's subpoena ordered MacArthur, as president of Bankers, to appear

before a named attorney of the Federal Trade Commission in Chicago on November 4, 1974, and to produce the documents described in the Specifications attached to the subpoena. The subpoena was issued by the regional director of the Commission's Kansas City, Missouri, office on October 1, 1974.

At the oral argument, we were told that the investigation was first assigned to the Commission's Kansas City, Missouri, office and then to its Denver, Colorado, office, but that the "inquiry" mentioned in paragraph 3 of Section 9 of the Federal Trade Commission Act is being carried on "in Chicago and other places." Since Bankers refused to produce documents within Specifications 4(d), 4(e) and 5 of the subpoena, and may have produced incomplete resolutions in response to Specification 4(c), the Commission decided to seek enforcement of its subpoena in Chicago, Illinois, where Bankers' documents are said to be located and its general offices are located.

[1, 2] These steps taken by the Commission are sufficient to show that an inquiry is being conducted in Chicago. The test whether the Commission is undertaking an inquiry in a particular place is whether that place and the activities occurring there bear a reasonable relation to the subject matter of the investigation. Factors such as the convenience of the Commission, the location of documents and witnesses, and the corporate headquarters of the company are relevant in determining whether there is an inquiry in a particular judicial district when the only action taken by the Commission is a request for information. As in other areas, the Commission's choice of a place of inquiry is subject to the bound of reasonableness. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652–653, 70 S.Ct. 357, 368–369, 94 L.Ed. 401, 415–416; *Adams* v. *Federal Trade Commission*, 296 F.2d 861, 866 (8th Cir. 1961), *certiorari denied*, 369 U.S. 864, 82 S.Ct. 1029, 8 L.Ed.2d 83. This limit has not been exceeded here.

Applying the reasonably related standard to the present situation, we are convinced that the use of "such inquiry" in paragraph 3 of the statute does not here exclude the Northern District of Illinois. Paraphrasing Judge Bonsal's opinion in *Federal Trade Commission* v. *Green*, 252 F.Supp. 153, 155 (S.D.N.Y.1966):

> Even if consideration is limited to that portion of the inquiry relating to [Bankers, Chicago] is a place where the inquiry is being carried on for [Bankers] has its principal place of business [there] and presumably the documents sought by the Commission are located [there].

[3] Our conclusion is not altered because other Commission offices are involved in the investigation. It was permissible for the subpoena to emanate from the Commission's Kansas City office, with the return to be at its Chicago office, for paragraph 2 of Section 9 (note 2, *supra*)

allows the Commission to require the "attendance of witnesses, and the production of such documentary evidence, * * * from any place in the United States, at any designated place of hearing." The next sentence of that paragraph permits the Commission to "invoke the aid of any court of the United States, in requiring the attendance and testimony of witnesses and the production of documentary evidence." Congress has given the Commission broad investigatory powers. *United States* v. *Morton Salt Co., supra,* 338 U.S. at 641–643, 70 S.Ct at 363–364, 94 L.Ed. at 410–411; *Federal Trade Commission* v. *Manager, Retail Credit Co.,* 169 U.S.App.D.C. 271, 515 F.2d 988, 993 (1975). Consistent with those powers is the power of the Commission to decide where to conduct an inquiry. The jurisdiction of the particular district court, as provided in the statute, follows from that decision. *Federal Trade Commission* v. *Sherry,* 1969 Trade Cases ¶ 72,906 (D.D.C.1969); *Federal Trade* [1141] *Commission* v. *Green, supra,* 252 F.Supp. at 155.

This holding does not conflict with *Federal Trade Commission* v. *Browning,* 140 U.S. App.D.C. 292, 435 F.2d 96 (1970), on which Bankers relies. In that case, the designated place of hearing was Washington, D.C., and the court stated that Washington, D.C. "is thus necessarily a place where the 'inquiry is carried on' " within the third paragraph of Section 9 of the Act. Here the designated place of hearing was Chicago, Illinois, and thus by parity of reasoning, it is necessarily one of the places where the inquiry is carried on.

[4] In opposition to the jurisdiction of the court below, Bankers asserts that the subpoena was amended to be returnable at Lake Park, Florida, so that there was no longer any Illinois "inquiry." However, the subpoena proper was never amended. Lake Park, Florida, was chosen as a substitute return place by informal agreement of counsel (Exhibit 3 to petition). In any event, the fact that an inquiry was conducted in Florida does not preclude the Commission from also conducting an inquiry in other parts of the country. Since compliance with the subpoena in Florida was not to the satisfaction of the Commission, it was entitled to attempt to enforce the October 1st subpoena which designated Chicago, Illinois, as the place of hearing. The Commission should not be required to go to each jurisdiction where documents are supposedly kept to secure enforcement of a subpoena when Section 9 of the Act allows the Commission to require the production of records from anywhere in the United States at any designated place of hearing. We hold that sufficient "inquiry" was being carried on in Illinois to confer jurisdiction on the court below under Section 9 of the Act.

Failure to Hold an Evidentiary Hearing

Although the district court held an adversary hearing before issuing

the contested order, respondents assert that they were entitled to an evidentiary hearing. At the proposed evidentiary hearing, respondents state that they would have shown:

(1) There was no "inquiry" in the Northern District of Illinois, as required by the third paragraph of Section 9 of the Federal Trade Commission Act.

(2) The Commission is already in possession of a "vast quantity" of subpoenaed documents.

(3) Bankers' role in the Colorado land sales was only that of a mortagagee and financier; Bankers never engaged in the offer or sale of the Colorado land.

In our view, an evidentiary hearing would have been inappropriate with respect to these subjects.

As to the first of the above topics, part 1 of this opinion has resolved this legal question on undisputed facts.

[5–8] As to the second and third topics, Bankers has failed to make a substantial challenge to the validity of the subpoena on issues requiring the district court to hold an evidentiary hearing. *United States* v. *Newman*, 441 F.2d 165, 168 (5th Cir. 1971). Rule 81(a)(3) makes the Federal Rules of Civil Procedure applicable to this action. Under those rules there is no requirement that the court hold an evidentiary hearing in all cases. Nor does "due process" require that the court take the testimony of witnesses in all situations. See *Mathews* v. *Eldridge*, —— U.S. ——, ——, 96 S.Ct. 893, 902, 903, 47 L.Ed.2d 18, 32, 33, 34, 44 L.W. 4224, 4229. In a summary enforcement proceeding, the burden is on the respondent to demonstrate the insufficiency of the petition. *United States* v. *Powell*, 379 U.S. 48, 58, 85 S.Ct. 248, 255, 13 L.Ed.2d 112, 119–120; *United States* v. *Newman*, *supra*, 441 F.2d at 169; *Federal Trade Commission* v. *Standard American, Inc.*, 306 F.2d 231, 235 (3d Cir. 1962). Before the district court need hold an evidentiary hearing, the respondent must show that there are disputed questions of fact whose resolution would warrant refusing enforcement of the subpoena. *United States* v. *Newman*, *supra*, 441 F.2d at 168. Bankers has not met this standard.

It is immaterial that the Commission already has a substantial quantity of the documents subpoenaed because the petition for [1142]enforcement is limited to matters where there has been no submission in three instances and possibly an incomplete submission in the fourth.[3] In the adversary hearing, Bankers offered no facts to show either that complying with the subpoena would be unduly burdensome (cf. *Federal Trade Commission* v. *Standard American, Inc.*, *supra*, 306 F.2d at 235) or that the material is clearly irrelevant to the proposed

[3] As shown above, there were no documents submitted in response to subpoena Specifications 4(d), 4(e) and 5 and a possibly incomplete submission with respect to Specification 4(c).

investigation. *Genuine Parts Co.* v. *Federal Trade Commission*, 445 F.2d 1382, 1391 (5th Cir. 1971). It was not error to refuse an evidentiary hearing.

[9, 10] Bankers' final claim that it is only a mortgagee and financier in the questioned transactions is an issue to be resolved by the Commission. As a matter of law, this assertion, even if true, is not a proper defense to the petition. *Federal Trade Commission* v. *Gibson*, 460 F.2d 605, 608 (5th Cir. 1972); *Federal Trade Commission* v. *Hallmark, Inc.*, 265 F.2d 433, 438–439 (7th Cir. 1959); see *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 214, 66 S.Ct. 494, 508, 90 L.Ed. 614, 632–33.

At the adversary hearing, the district court satisfied itself that the investigation and subpoena "were legally authorized and properly motivated, and for a purpose related to the Commission's powers." Since respondents' proposed evidence would not have shown that the Commission was exceeding or abusing its investigative powers, an evidentiary hearing was not needed. *Securities & Exchange Commission* v. *Howatt*, 525 F.2d 226, 229–230 (1st Cir. 1975); *United States* v. *Newman*, *supra*, 441 F.2d at 168–169. No exceptional circumstances have been elicited to necessitate an evidentiary hearing. Therefore, the summary proceeding before the district court sufficed. *Donaldson* v. *United States*, 400 U.S. 517, 528–529, 91 S.Ct. 534, 541, 27 L.Ed.2d 580, 587–88; *United States* v. *Turner*, 480 F.2d 272, 275 (7th Cir. 1973); *Federal Trade Commission* v. *Sherry*, *supra*, 1969 Trade Cases ¶ 72,906 at p. 87, 455 (D.C.Cir. 1969).

Propriety of Limiting Enforcement Order to Documents in Northern District of Illinois

[11] The district court refused to enforce the subpoena with respect to documents outside the Northern District of Illinois because of doubts as to its authority to order the production of such documents and because of the judge's feeling that contempt citations should take place where the documents are located. Neither reason supports the refusal to enforce the subpoena as to such documents. Paragraph 2 of Section 9 of the Federal Trade Commission Act authorizes the Commission to secure the production of documentary evidence from any place in the United States and to invoke the aid of any district court of the United States in case of disobedience to a subpoena. The language of the statute confers upon the court the power to enforce the subpoena without regard to the location of the documents. See *Federal Maritime Commission* v. *DeSmedt*, 366 F.2d 464, 469–471 (2d Cir. 1966), *certiorari denied*, 385 U.S. 974, 87 S.Ct. 513, 17 L.Ed.2d 437. The power conferred by the statute is consistent with the court's general authority to enforce its orders against those over whom it has

in personam jurisdiction. (*United States* v. *First National City Bank*, 396 F.2d 897, 900–901 (2d Cir. 1968); *Elder-Beerman Stores Corp.* v. *Federated Department Stores, Inc.*, 45 F.R.D. 515, 516 (S.D.N.Y. 1968)). This authority includes use of contempt sanctions. *Shillitani* v. *United States*, 384 U.S. 364, 370, 86 S.Ct. 1531, 1535, 16 L.Ed.2d 622, 627; *United States* v. *Fidanian*, 465 F.2d 755, 757 (5th Cir. 1972), *certiorari denied*, 409 U.S. 1044, 93 S.Ct. 540, 34 L.Ed.2d 494. The court below should have enforced the relevant parts of the subpoena *in toto*.

Any contrary holding would defeat the Commission in its attempt to secure documentary evidence, for it would require the Commission to enforce its subpoena in every district in which documents are located. This would be contrary to Section 9. As [1143]stated in *Federal Trade Commission* v. *Browning*, *supra*, 435 F.2d at 100:

> It makes for uniformity of the application of the law [Federal Trade Commission Act] and economy of judicial administration to enter the enforcement proceedings in a single court.

Therefore the district court should have required the respondents to produce their outside records in the Northern District of Illinois, thus obviating any Florida proceedings.

Imposition of Protective Order

[12] The court below *sua sponte* ordered the Commission not to disclose information obtained through the subpoena to the public "except in connection with a public proceeding." The Commission's rules prohibit such disclosure without permission of the Commission. 16 C.F.R. § 4.10(c). Sanctions are provided in Section 10 of the Federal Trade Commission Act (which imposes a maximum fine of $5,000, maximum imprisonment of one year, or both) for unauthorized disclosure of information obtained by the Commission (15 U.S.C. § 50). In the case of this non-public investigation and without any showing of good cause, the imposition of a protective order was uncalled for. *Federal Trade Commission* v. *United States Pipe & Foundry Co.*, 304 F.Supp. 1254, 1260 (D.D.C.1969); *Federal Trade Commission* v. *Green*, *supra*, 252 F.Supp at 157.[4]

Partial Transfer of Proceedings

[13] In its order, the district court transferred to the Southern District of Florida a portion of the case dealing with all MacArthur's records and those records of Bankers located outside the Northern District of Illinois. Under the statute authorizing the transfer (28

[4] There has been no claim of confidentiality as to these documents. Consequently, *Federal Trade Commission* v. *Texaco, Inc.*, 517 F.2d 137, 151 (D.C.Cir. 1975), and *Federal Trade Commission* v. *Continental Can Co.*, 267 F.Supp. 713, 716 (S.D.N.Y.1967), are inapt.

U.S.C. § 1404(a)), the district court is to weigh, among other factors, the convenience of the witnesses and the parties, the costs of the transfer, the public interest involved and any special circumstances present in the case. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055; *Starnes* v. *McGuire*, 168 U.S.App.D.C. 4, 512 F.2d 918, 925 (1974) (en banc). Each case must be examined on its own facts. *Starnes* v. *McGuire*, *supra*, 512 F.2d at 925; *Texas Gulf Sulphur Co.* v. *Ritter*, 371 F.2d 145, 147 (10th Cir. 1967).

[14, 15] The principal reason given in the affidavit supporting respondents' motion to transfer was that an evidentiary hearing on the petition for enforcement would be more convenient to the parties and witnesses in the Southern District of Florida. However, we have held that respondents are not entitled to an evidentiary hearing, so that the keystone to their transfer motion has crumbled. Further, as a result of this order, duplications and possible conflicts between the two district courts could occur. For such reasons, partition of the "pre-trial" processes is undesirable. As the Judicial Panel on Multidistrict Litigation stated in *In re Plumbing Fixture Cases*, 298 F.Supp. 484, 495 (1968), an action should not be split between two districts. See *Bristol Laboratories* v. *Richardson*, 456 F.2d 563 (1st Cir. 1971); *Pfizer, Inc.* v. *Lord*, 447 F.2d 122, 125 (2d Cir. 1971); *Wyndham Associates* v. *Bintliff*, 398 F.2d 614, 618 (2d Cir. 1968), *certiorari denied*, 393 U.S. 977, 89 S.Ct. 444, 21 L.Ed.2d 438. In this posture, the motion to transfer should have been denied in its entirety.[5]

The order is reversed insofar as it transfers a portion of the case to the Southern District of Florida and imposes a non-disclosure clause. The order is affirmed in all other respects, except that enforcement shall not be limited to documents located [1144] within the Northern District of Illinois; costs to petitioner.

[5] Mr. MacArthur was subpoenaed "in his representative capacity" as custodian of the documents. (See the Commission's June 25, 1975, motion to amend the pleadings and the remarks of its counsel at the June 25, 1975, and July 8, 1975, proceedings below.) Our affirmance does not require his presence in Illinois. A suitable substitute will suffice. If the parties should agree on production in Florida, our mandate will not stand in the way.

ASSOCIATION OF NATIONAL ADVERTISERS, INC. v. FEDERAL TRADE COMMISSION et al*

Civ. A. No. 75–1304. F.T.C. File No. 99–238.

(United States District Court, District of Columbia, April 1, 1976)

In a Freedom of Information Act action, court granted F.T.C. a protective order for documents, pending resolution of cross-motions for summary judgment, excepting interrogatories on the issue of Commission delay in transmitting some of the documents. Court held that although discovery would be prohibited where the Secretary had attested that search for the documents was Commission-wide and thorough, discovery would be allowed where a significant disparity between actions and words raised an issue as to the completeness of the search. Such an issue was raised by Commission delay in releasing some of the data.

Stephen A. Weitzman, Washington, D.C., for plaintiff.
John R. Dugan, Asst. U.S. Atty., Washington, D.C., for defendants.
Before JONES, *Chief Judge*.

MEMORANDUM AND ORDER

This action was brought pursuant to the Freedom of Information Act, 5 U.S.C. § 552, seeking access to certain documents withheld by defendants previously sought by plaintiff. Plaintiff requested access to "all documents relating to any activity or activities of FTC personnel, anywhere in the nation, with respect to publicizing the Commission's proposed trade regulation rule for food advertising, or soliciting public reactions, communications or responses with respect thereto." In response to this request, the Secretary of the FTC took the following action:

> On March 26, 1975, this Office forwarded a memorandum to all Commission offices in which any personnel were employed who possibly were engaged in any way in any activities relating to publicizing the Commission's proposed food advertising rule or soliciting public response thereto. The search memorandum was sent to all of the Commission's Regional Offices throughout the United States, as well as to other offices in the Commission's headquarters in Washington, D.C. All persons requested by me to conduct the search responded thereto and forwarded copies of documents located by them or by those personnel under their immediate supervision and direction.

Tobin Aff. ¶ 5. The documents, other than those withheld in whole or in part because of a claimed exemption, were made available to plaintiff on March 28, 1975. Certain additional documents were authorized to be released on September 23, 1975.

Presently pending before the Court are two sets of motions. On

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 60,835 at 68,643 (1976–1 Trade Cases).

December 4, 1975, defendants moved for summary judgment after filing a *Vaughn* v. *Rosen* index of documents withheld. On February 2, 1976, plaintiff moved for partial summary judgment directed only to the propriety of the indexing and withholding of the documents which were the subject of the defendants' index. According to plaintiff, there remain factual questions as to the FTC's activities "in complying with ANA's FOIA request and the completeness of that compliance." Pl's Mem. in Support of Partial Motion for Summary Judgment at 1. On January 29, 1976, plaintiff noticed the deposition of certain unspecified officials or employees of the Commission. Defendants have moved for a protective order against all discovery pending determination of the pending motions for summary judgment. This latter motion is the subject of this Memorandum and Order.

It is clear that civil discovery is a proper method for pursuing factual disputes as to the adequacy or completeness of an agency search for records requested pursuant to the FOIA. See *National Cable Television Assn'n, Inc.* v. *FTC*, 479 F.2d 183, 193 (D.C. Cir. 1973). Where the record before the court indicates that the agency search was reasonably thorough, however, discovery may be limited by the Court. See *Exxon Corp.* v. *FTC.*, 384 F.Supp. 755, 759–60 (D.D.C. 1974), remanded without opinion, January 28, 1976 (D.C. Cir. No. 74–1966). The Secretary's statement in paragraph 5 of his affidavit demonstrates that the search undertaken in the instant case was as broad as possible, that Commission documents were returned to him by those persons directed to conduct the search, and that these documents were promptly made available to plaintiff. An almost indentical representation, albeit in response to an Interrogatory, was held sufficient to demonstrate the adequacy of an agency search in *Exxon Corp., supra.*

Plaintiff poses five factual questions concerning the agency search in the instant case, only one of which raises any inference that the search was not complete. The first four questions concern the timing of the various steps of the search, the method of transportation for the documents, the degree of care in the search, the particular efforts undertaken by each of the Commission offices in complying with the request. Discovery of facts relevant to each of these questions inevitably would lead "down to the level of each individual participating in the search." *Exxon Corp., supra* at 760. To permit such discovery in a case such as the instant one, where the request for access is Commission-wide, and where the Secretary of the Commission has already stated under oath that the search was Commission-wide and complete, would be to permit unnecessary harassment of agency officials. Plaintiff must demonstrate some substantial discrepancy between the defendants' actions and words in order to justify such

discovery. This has not been done with regard to the first four "factual questions" as outlined by plaintiff.

The fifth question, however, presents a substantial issue of the completeness of the agency search. Plaintiff seeks clarification of the delay in releasing certain documents until September 23, 1975. The defendants have offered no explanation, and there exists an inference that the initial search was incomplete or inadequate because it did not encompass these documents. The validity of the inference can sufficiently be pursued through interrogatories, and the court will permit this as an exception to the protective order it will enter. The interrogatories will be limited, however, to the question of the delay in releasing the documents until September 23, 1975.

In light of the foregoing, it is this 1st day of April, 1976, without a hearing pursuant to Local Rule 1–9(f),

Ordered that defendants' motion for a protective order be and the same hereby is granted, and it is further

Ordered that no discovery be instituted in this proceeding pending determination of the parties' motions for summary judgment, except that plaintiff may propound interrogatories to the defendants relevant to the question of the defendants' delay in releasing certain documents until September 23, 1975.

UNITED STATES v. BESTLINE PRODUCTS CORPORATION, et al.*

Civ. A. No. C-73-0944-CBR. F.T.C. Docket C-1986.

(United States District Court, Northern District of California, April 2, 1976)

1. IT WAS UNNECESSARY TO ESTABLISH CORPORATE PRESIDENT HELD AUTOCRATIC CONTROL OVER CORPORATION BEFORE HOLDING HIM LIABLE FOR CIVIL PENALTIES.

[755] Government was not required to establish that corporate president exercised autocratic control over the corporation before president could be liable for civil penalties for alleged violations of consent order settling unfair trade practices case.

2. THOSE RESPONSIBLE FOR CONDUCT OF CORPORATE AFFAIRS ARE BOUND BY COMMAND TO CORPORATION TO STOP ALLEGED UNFAIR TRADE PRACTICE.

A command to a corporation to stop an alleged unfair trade practice is binding on those responsible for the conduct of the corporation's affairs.

3. ALTHOUGH INCLUDING CORPORATE OFFICERS IN THEIR INDIVIDUAL CAPACITIES IN AN UNFAIR TRADE PRACTICE ORDER IS AN ERROR, WHERE ORDER AGAINST CORPORATION ALONE MAY BE EASILY EVADED, IT MAY BE NECESSARY TO INCLUDE SUCH OFFICERS WHEN THEY FIT CERTAIN CATEGORIES.

It is error to include in an unfair trade practice order or decree directed against a corporation the corporation's officers in their individual capacities; however, including corporate officers individually may be necessary if Federal Trade Commission's orders are to be fully effective in preventing unfair competitive practices, such as where corporate officials personally direct the corporate activities and formulate its policies or directly participate in the unlawful activity or are the sole or one of the few stockholders or otherwise give the Commission reason to believe that an order against the corporation alone could be easily evaded.

4. CORPORATE PRESIDENT COULD BE HELD LIABLE FOR CIVIL PENALTIES IF HE WAS OFFICIALLY RESPONSIBLE FOR CORPORATION'S NONCOMPLIANCE WITH CONSENT ORDER.

If corporate president was officially responsible for conduct of corporation's affairs and if he prevented corporation from complying with consent order in unfair trade practices case, or failed to take appropriate action within his power for performance of the corporate duty, he could be held liable in civil penalties for corporation's alleged noncompliance with the order.

5. INDIVIDUAL SIGNATORY TO CONSENT ORDER IS BOUND BY ITS TERMS UNTIL F.T.C. MODIFIES THE OBLIGATIONS OF THE ORDER; RESIGNATION FOLLOWING ENTRY OF ORDER DOES NOT RELIEVE HIM OF LIABILITY FOR CIVIL PENALTIES.

Mere fact that corporate president resigned following entry of consent order

* Reported in 412 F.Supp. 754 (1976). For case before the Commission, see 79 F.T.C. 107; *modified* 85 F.T.C. 407.

settling unfair trade practices case did not relieve him of liability for civil penalties for alleged violations of order where he continued to function within the corporate hierarchy as senior executive and participated in formulation of major corporate policy and helped to revise and ultimately approve corporation's postconsent order marketing programs; as an individual signatory to the order, the former president was personally bound by its terms and remained so until such time as the Federal Trade Commission or the court saw fit to modify the obligations placed on him.

6. THERE WAS NO SHOWING THAT CORPORATE PRESIDENT'S SIGNATURE ON CONSENT ORDER WAS INDUCED BY ANY PROMISE, IMPLIED OR EXPRESSED, OF IMMUNITY BY THE COMMISSION.

Fact that corporate president may have believed that his signature to consent order settling unfair trade practices case bound him to the corporation's activities only in his official capacity did not absolve him from personal liability for civil penalties for alleged violations of the order since he could be held civilly liable solely by virtue of his position as senior officer responsible [756] for corporation's affairs and irrespective of his status as a signatory to the order; in any event, there was no showing that Federal Trade Commission induced his signature under an express or implied promise of immunity.

7. EXTRINSIC EVIDENCE COULD BE USED AS AN INTERPRETIVE AID WHERE PROVISION OF CONSENT ORDER WAS AMBIGUOUS ON ITS FACE.

Provision of consent order whereby defendants, charged with engaging in unfair trade practices, agreed to desist from operating, directly or indirectly, any multilevel marketing program where financial gain of participants was dependant on continued, successful involvement of other participants was ambiguous on its face and, hence, extrinsic evidence could be used as an interpretative aid.

8. ORDER PROVISION BANNED THE COMPENSATION OF PARTICIPANTS FOR RECRUITING FUNCTIONS REGARDLESS OF WHETHER FUNCTION WAS USEFUL, NOT THE UNCOMPENSATED RECRUITMENT OF PERSONNEL OR INDIRECT FINANCIAL GAIN ACCRUING FROM ROUTINE HIRING PRACTICES.

Provision of consent order that defendants would cease and desist from operating any multilevel marketing program wherein financial gain to participants was dependent on recruitment of others and would cease from paying any commissions, etc., unless recipient performed bona fide and essential supervisory functions in connection with sale or delivery of the product to the consumer did not proscribe uncompensated recruitment of marketing program personnel of indirect or remote financial gain that might accrue as result of routine hiring of personnel; ban was on compensating participants for recruiting functions regardless of whether they performed a useful function in the distribution or sale of the product to the consumer.

9. DEFENDANTS VIOLATED ORDER PROVISION BY COMPENSATING PARTICIPANTS FOR RECRUITING FUNCTIONS IRRESPECTIVE OF WHERE THEY WERE ALSO COMPENSATED FOR PERFORMING USEFUL FUNCTION.

Where a distributor of defendants' products benefited financially from persuading others to join the multilevel marketing structure in that, among other things, a commission was paid to higher level distributor when a lower level distributor sponsored by the former chose to ascend the distributorship ladder, such practices violated provision of unfair trade practices consent order prohibiting operation of any marketing program wherein participants were compensated for

any recruiting functions irrespective of where they were also compensated for performing a useful function in product distributorship.

10. NONCOMPLIANCE WITH PROVISION OF ORDER WAS NOT EXCUSED BY FACT THAT PARTICIPANTS SUPERVISED THOSE WHOM THEY SPONSORED SINCE SUPERVISORY FUNCTIONS WERE DE MINIMIS IN THE SALE AND DELIVERY OF THE PRODUCT.

Even if participants in multilevel marketing program regularly supervised those whom they "sponsored," such fact did not serve to excuse noncompliance with provision of consent order prohibiting operation of marketing program wherein participants were directly compensated for recruiting functions; in any event, bona fide and essential supervisory functions were so insignificant as to be deemed de minimis and any training and supervisory functions were not necessarily essential in the sale and delivery of the product to the ultimate consumer.

11. REQUIREMENT OF MONTHLY CO-OP DUES VIOLATED PROVISION OF ORDER PROHIBITING CHARGES OTHER THAN FOR ACTUAL COSTS OF SALES MATERIALS.

Requiring those occupying highest distributorship level in multilevel marketing program used in connection with sale of household and industrial cleaning products to pay a $25 per month co-op dues violated provision of unfair practices consent order prohibiting defendants from requiring prospective participants or participants to purchase the product or pay any other consideration, other than payment for actual cost of sales materials.

12. REQUIREMENT OF PAYMENT TO GENERAL TRAINING FUND VIOLATED PROVISION OF ORDER PROHIBITING CHARGES FOR OTHER THAN ACTUAL COST OF NECESSARY MATERIALS.

Requiring intermediate level distributors who wished to ascind to highest level of distributorship in defendants' multilevel marketing program for sale of household and industrial cleaning products to make payments to a general training fund violated provision of unfair practices consent order requiring defendants to cease and desist from requiring prospective participants or participants to purchase the products or pay [757] any other consideration other than actual cost of necessary sales materials.

13. PAYMENT OF $5 FEE WAS DE MINIMIS AND WOULD NOT BE DEEMED A VIOLATION OF THE CONSENT ORDER PROVISION.

Requiring new local distributors of defendants' household and industrial cleaning products to pay an initial $5 fee on entering multilevel marketing program, purportedly for associate membership in distributors' association, was de minimis and, hence, would not be found to violate provision of unfair practices consent order directing defendants to cease and desist from requiring prospective participants to purchase product or pay any consideration other than actual cost of necessary sales materials.

14. WHERE DISTRIBUTOR ASCENDED TO HIGHER LEVEL BY PREPURCHASE OF INVENTORY AND SALES AIDS, PAYMENT OF COMMISSION TO HIGHER LEVEL SPONSOR DID NOT VIOLATE ORDER PROVISION.

Commission paid to higher level sponsoring distributor on lower level distributor's ascending to a higher level of distributorship in multilevel program by prepurchasing specified amount of inventory and sales aids did not violate provision of unfair practices consent order directing defendants to cease and desist from requiring participants to purchase the product or pay any consideration other than actual cost of necessary sales materials.

15. REQUIREMENT OF $441 PAYMENT FOR "ADMINISTRATIVE AND PROCESSING COSTS" VIOLATED ORDER PROVISION WHERE THE $441 WAS NOT INCLUDED IN ANY REFUND PROVISIONS.

Requirement that a lower level distributor desiring to ascend to higher level of distributorship in multilevel marketing program pay $441 for "administrative and processing costs" violated provision of unfair practices consent order prohibiting defendants from requiring participants to pay any consideration other than actual cost of necessary sales materials, provided defendants could require purchase of reasonable inventories subject to full refund less reasonable shipping costs, within 90 days, where the $441 was not included as part of any refunds.

16. PROVISION PROHIBITING USE OF PROGRAMS WHERE COMPENSATION WAS BASED ON CHANCE RATHER THAN SKILL WAS NOT VIOLATED WHERE THERE WAS NO SHOWING THAT THE ACTUAL MARKET WAS SATURATED.

Absent showing of actual market saturation, it could not be said that multilevel marketing program violated provision of unfair practices consent order prohibiting use of any program wherein compensation was dependent on element of chance dominating over skill or judgment of participants, on theory that a program which permits the number of participants to increase geometrically inevitably results in an increasingly saturated market and that the more highly saturated the market the more difficult it is for a participant to gain financially and that saturation level is a function of factors over which a participant has no control.

17. REQUIREMENT OF ORAL DISCLOSURE WAS NOT SATISFIED BY ORAL REFERENCE TO WRITTEN STATEMENT OF DISCLOSURE.

Oral exhortation to consult specified pages of opportunity book, which stated that a participant could cancel his distributorship contract in three working days from date on which contract was signed, did not satisfy provision of unfair practices consent order requiring defendants to orally inform participants and to provide in writing in all contracts that agreement might be cancelled for any reason on notice within three working days of execution thereof; oral reference to written statement did not satisfy oral disclosure requirement.

18. VIOLATION OF PROVISION REQUIRING ORAL DISCLOSURE OF CANCELLATION RIGHTS WAS SUFFICIENTLY ESTABLISHED BY GENERAL DISTRIBUTOR'S STATEMENT THAT HE DID NOT RECALL HEARING ORAL DISCLOSURE AT AS MANY AS 10% OF THE OPPORTUNITY MEETINGS.

Statement of general distributor that at perhaps as many as 10% of the opportunity meetings he did not recall hearing required oral disclosure concerning right of cancellation of distributorship contract was alone sufficient to establish violation of provision of unfair practices consent decree requiring that all participants in multilevel marketing program be orally informed of right to cancel within three working days of execution of distributorship contract.

19. REQUIREMENT THAT RIGHT OF CANCELLATION NOTICE BE INCLUDED IN CONTRACTS WAS NOT VIOLATED BY FAILURE TO DIRECTLY INCLUDE IT IN GENERAL DISTRIBUTORSHIP AGREEMENTS, BUT THE REQUIREMENT WAS VIOLATED WHERE THOSE AGREEMENTS WERE SELF-EXECUTING.

Failure to include three-day cancellation right directly in general distributorship [758] agreement used in connection with multilevel marketing program did not violate provision of unfair practices consent decree requiring notice of cancellation right to be included in contracts in writing where general distributorship agreement incorporated by reference both terms of direct distributorship contracts and business opportunity book and both of such documents contained the requisite

three-day cancellation clause; however, subsequently used general distributorship contract violated such requirement where they were made self-executing, i.e., were effective two, and later three, days after date on which they were mailed.

20. VIOLATION OF ANY PROVISION OF ORDER DOES NOT NECESSARILY IMPLY VIOLATION OF SPECIFIC PROVISION.

Violation of any provision of unfair practice consent order concerning multilevel marketing program used in connection with sale of defendants' household and industrial cleaning products did not necessarily imply a violation of that provision requiring defendants to disclose terms of the order to all participants.

21. CONTENTS OF SCRIPTS ARE INSUFFICIENT TO ESTABLISH VIOLATION OF ORDER PROVISION REQUIRING DISCLOSURE OF TERMS OF ORDER.

Mere fact that scripts used at opportunity meetings required the speakers to inform participants of provisions of unfair practices consent order concerning defendants' multilevel marketing program did not establish the violation of that provision of order requiring disclosure of its terms to all participants since it was possible that speakers at the opportunity meetings deviated from the scripts and spoke extemporaneously or informed participants of terms of the order on other occasions.

22. ALTHOUGH CONSENT ORDER DID NOT REQUIRE ITS TERMS BE QUOTED VERBATIM, BY PARAPHRASING THEM, DEFENDANT ASSUMED RISK THAT LANGUAGE WOULD FAIL TO ADEQUATELY INFORM PARTICIPANTS OF THOSE TERMS.

Although unfair practices consent order issued in connection with operation of multilevel marketing program did not require defendant to quote terms of consent order verbatim in the written disclosure to program participants, by paraphrasing those terms the defendant assumed a risk that the language employed would fail, as a matter of law, adequately to inform participants of those terms.

23. PROVISION OF ORDER WAS VIOLATED WHERE REFERENCE TO SPECIFIC REQUIREMENT WAS OMITTED.

Information set forth in business opportunity book failed to adequately comply with requirement of unfair practices consent order that terms thereof be disclosed in writing to all participants where, among other things, book omitted any reference to requirement that when inventory cost reached $500 or more within 90-day refund period defendants' obligations under the order to repurchase unused inventory immediately ceased on subsequent purchasers' product and book initially failed to mention that no consideration could be paid for recruitment of others into the program.

24. LACK OF WILLFUL OR DELIBERATE ATTEMPT TO CIRCUMVENT ORDER DID NOT EXCUSE VIOLATIONS BUT WOULD BE CONSIDERED IN ASSESSING SEVERITY OF PENALTIES.

Fact that violations of unfair practices consent order concerning operation of multilevel marketing program for sale of household and industrial cleaning products may not have been willful or deliberate did not excuse the violations but, rather, went only to matter of severity of civil penalty.

(Syllabus, with substituted captions, taken from 412 F.Supp. 754).

On motion for partial summary judgment, Court held that defendants violated cease and desist order by operating a marketing

program where financial gain to participants depended on recruitment of others; paid considerations to participants who did not perform bona fide functions in the sale or delivery of products to consumers; where participants wishing to move from one distributor level to another were required to make certain payments; and where defendants failed to make required written and oral disclosures.

Defendants' motion denied; Government's motion granted in part and denied in part.

James L. Browning, Jr., U.S. Atty., *William B. Spohn*, San Francisco, Calif., *Robert V. Allen, Charles R. McConachie*, Dept. of Justice, Washington, D.C., for plaintiff; *Henry G. Pons*, F.T.C., Washington, D.C., *Ralph E. Stone*, F.T.C., San Francisco, of counsel.

Joseph W. Cotchett, Cotchett, Hutchinson & Dyer, San Mateo, Calif., for defendant Bailey.

Robert W. Humphreys, Humphreys, Berger & Pitto, San Jose, Calif., for defendants Bestline.

Memorandum of Opinion

Renfrew, *District Judge.*

The United States of America brought this action pursuant to the Federal Trade [759] Commission Act, 15 U.S.C. §§ 45 and 49, to recover civil penalties for alleged violations of a Federal Trade Commission Consent Order to Cease and Desist ("Consent Order"). On September 30, 1974, the Court approved a Final Consent Judgment and Order respecting the corporate defendants. The remaining defendant is William E. Bailey. Both parties have moved for partial summary judgment; these motions were argued extensively at hearings held on September 4, 1975, and December 11, 1975.

I. *Factual Background*

On July 22, 1970, the Federal Trade Commission ("Commission") notified Bestline Products Corporation and Bestline Products, Inc., ("Bestline"), William E. Bailey, and Robert W. DePew of its intention to issue an administrative complaint against the corporations and against Bailey and DePew, individually and as officers of the corporations.[1] The complaint charged, *inter alia*, that the multi-level marketing program Bestline utilized in connection with the sale of its household and industrial cleaning products permitted participants to receive compensation for both the sale of Bestline products to the consuming public on a retail basis and in addition—and this was the basis of the Commission's concern—for recruiting other persons to

[1] Mr. DePew is no longer associated with the Bestline corporations and is not a party to the instant action.

enter the Bestline distribution network. The complaint further alleged that persons were induced to participate in Bestline's marketing program by statements and representations that large financial awards would be derived through product sales and recruitment whereas, in truth and in fact, the realization of the represented financial gains contemplated "a virtually endless recruiting of participants into the sales program" and was "necessarily predicated upon, the exploitation of others who [had] virtually no chance of receiving a return on their investment". For these and other reasons, the complaint concluded and charged that "the use by respondents of the aforesaid program in connection with the sale of their merchandise was and is an unfair act and practice, and was and is false, misleading and deceptive." *In the Matter of Bestline Products Corporation*, F.T.C. Docket No. C–1986, Complaint at 5–6.

The marketing program described and challenged in the complaint encompassed four levels of distribution personnel: the Retail Distributor, the Sub-Wholesaler, the Direct Distributor and the General Distributor. Participants at each level were entitled to purchase Bestline products at variable discounts. Thus, the Retail Distributor purchased products from a Sub-Wholesaler or Direct Distributor at a 30 to 40 per cent discount; the Sub-Wholesaler received a 30 to 51 per cent discount; the Direct Distributor received a 52 per cent discount; and the General Distributor received a 60 per cent discount. The compensation paid participants for recruiting other persons to enter the Bestline distribution network also varied. For example, a Sub-Wholesaler received a bonus for recruiting a Direct Distributor, and a commission for recruiting another Sub-Wholesaler. He was entitled to overrides on purchases by Retail Distributors below him, as well as commissions and continuing overrides on purchases by persons he recruited. The General Distributor received a commission and continuing overrides on all purchases by a Direct Distributor recruited by him. If a Direct Distributor recruited by the General Distributor ascended to the position of General Distributor, the sponsoring General was entitled to a release fee, commission, and continuing override on all future purchases by the recruited General.

A participant ascended the Bestline distribution chain by meeting certain product-purchase requirements. A Sub-Wholesaler was required to purchase products with a $400 "refund volume" value; the comparable purchase requirement for a Direct Distributor was $6,000. Only a Direct Distrib[760]utor could qualify as a General Distributor. In addition, a Direct seeking to become a General was required to recruit another Direct, and pay $2,750 to Bestline.

Following a period of negotiations, the Commission and the proposed respondents agreed to settle the case by entry of a proposed consent

order. Although respondents did not admit that the acts and practices condemned in the complaint violated 15 U.S.C. § 45, they did agree that "[t]he complaint may be used in construing the terms of the order." *In the Matter of Bestline Products Corporation*, F.T.C. Docket No. C–1986, Agreement Containing Consent Order to Cease and Desist, at 2. They further agreed that

Proposed respondents William E. Bailey and Robert W. DePew are officers and stockholders of the corporate respondents. They formulate, direct and control the acts and practices of the corporate respondents. *Id* at 1.

Bailey signed the agreement containing the Consent Order in three capacities: (1) President of Bestline Products Corporation (2) President of Bestline Products, Inc., and (3) "individually and as an officer of said corporations." *Id.* at 6–7. On July 22, 1971, the Commission issued the Consent Order, which became final on November 3, 1971.[2]

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[2] Pursuant to the Consent Order, respondents agreed to cease and desist from:

"1. Operating or, directly or indirectly, participating in the operation of any multi-level marketing program wherein the financial gains to the participants are dependent upon the continued, successive recruitment of other participants.

"2. Offering to pay, paying or authorizing the payment of any finder's fee, bonus, override, commission, cross-commission, discount, rebate, dividend or other consideration to any participants in respondent's multi-level marketing program for the solicitation or recruitment of other participants therein.

"3. Offering to pay, paying or authorizing payment of any bonus, override, commission, cross-commission, discount, rebate, dividend or other consideration to any person, firm or corporation in connection with the sale of any product or service under respondent's multi-level marketing program unless such person, firm or corporation performs a bona fide and essential supervisory, distributive, selling or soliciting function in the sale and delivery of such products to the ultimate consumer.

"4. Requiring prospective participants or participants in respondents' said program to purchase the product or pay any other consideration, other than payment for the actual cost of necessary sales materials, in order to participate in any manner therein; provided, however, that respondents may require or may suggest the purchase of specific and reasonable inventories only, by any distributor, on the express condition that respondents at the same time agree to repurchase any unused and undamaged portion of an initial inventory from any purchaser thereof at full cost less reasonable shipping costs, if any, within 90 days from the delivery of the product at the option of the purchaser; provided further, however, that if inventory costs reach $500 or more, within said 90 day period, then said obligation to repurchase shall cease immediately upon participant's tendering a subsequent order to purchase the product.

"5. Using any multi-level marketing program, either directly or indirectly:

"(a) Wherein any finder's fee, bonus, override, commission, cross-commission, discount, rebate, dividend or other compensation or profit inuring to participants therein is dependent on the element of chance dominating over the skill or judgment of the participants; or

"(b) Wherein no amount of judgment or skill exercised by the participant has any appreciable effect upon any finder's fee, bonus, override, commission, cross-commission, discount, rebate, dividend or other compensation or profits which the participant may receive; or

"(c) Wherein the participant is without that degree of control over the operation of such plan as to enable him substantially to affect the amount of any finder's fee, bonus, override, commission, cross-commission, discount, rebate, dividend or other compensation or profit which he may receive or be entitled to receive.

"6. Using any multi-level marketing program which fails to:

"(a) Inform orally all participants in respondents' multi-level marketing programs and to provide in writing in all contracts of participation that the contract may be cancelled for any reason by notification to respondents in writing within three working days from the date of execution of such contract.

"(b) Refund immediately all monies to (1) Participants who have requested contract cancellation in writing within three working days from the execution thereof, and (2) participants showing that respondents' contract solicitations or performance were attended by or involved violation of any of the provisions of this order.

"7. Representing, directly or by implication, that participants in respondents' multi-level marketing programs will earn or receive any stated or gross or net amount; or representing, in any manner, the past earnings of participants unless in fact the past earnings represented are those of a substantial number of participants in the community or geographical area in which such representations are made and accurately reflect the average earnings of these participants under circumstances similar to those of the participant or prospective participant to whom the representation is made.

(Continued)

[761] On September 8, 1971, respondents commenced discussions with the Compliance Division of the Commission. By letter dated October 1, 1971, Mr. Henry G. Pons, an attorney with the Commission's Compliance Division, informed counsel for Bestline that the materials that had thus far been submitted to the Commission failed to establish that respondents were in compliance with the Consent Order. Specifically, Mr. Pons indicated that paragraphs 1, 2, 3, 4, 5, 6(a), 7, 10 and 12(a) of the Consent Order had not been complied with. Counsel for Bestline, Mr. Richard J. Grillo, replied to Mr. Pons' letter by letter dated October 22, 1971. It is clear from these two letters that significant differences existed between the Commission and the respondents to the Consent Order in the interpretation of the Order, particularly with respect to paragraphs 1 and 3. Negotiations continued and on November 10, 1971 a final compliance report was filed with the Commission.

Under the first revised marketing plan described in the November 10, 1971 compliance report, the number of levels in Bestline's marketing program was reduced from four to three: the Local Distributor, the Direct Distributor, and the General Distributor. As in the original marketing program, all distributors were entitled to retail Bestline products directly to the public, and to sponsor other persons they recruited into the marketing program. Distributors received variable discounts for product purchases depending upon purchase volume: 30 to 52 per cent for a Local Distributor, 52 per cent for a Direct, and 60 per cent for a General.

According to the revised marketing program, a Local Distributor who "sponsored" and "assisted" other Local Distributors in making sales received a volume credit for the recruit's product purchases. In this manner, a Local could increase his product discount up to the 52 per cent level. A Local Distributor could ascend to Direct in one of two ways. He could sell $4,800 retail value of Bestline products in one

"8. Representing, directly or by implication, that it is not difficult for participants to recruit or retain persons to invest in respondents' multi-level marketing programs as distributors or as sales personnel to work home routes or sell respondents' products door-to-door or any other manner.

"9. Representing, directly or by implication, that it is not difficult for participants to ascend to a higher level of distribution within the marketing chain.

"10. Representing, directly or by implication, that all participants in the respondents' multi-level marketing program or any other sales program will succeed.

"11. Representing, directly or by implication, that the supply of available entrants or investors in the respondents' marketing program is inexhaustible; or misrepresenting, in any manner, the availability of such entrants or investors.

"12.

(a) Failing to disclose, orally and in writing, the terms of this order to cease and desist to all present and future distributors, salesmen or other persons engaged in the sale of respondents' products, services, or merchandising programs, and securing from each such distributor, salesmen [*sic*] or other person a signed statement evidencing receipt of said disclosure.

"(b) Failing to make available on request a copy of this cease and desist order to any participant or prospective participant."

calendar month, with the product purchases of persons he recruited as Local Distributors counting towards his purchase volume requirements. Alternatively, a Local Distributor could ascend by pre-purchasing approximately $5,500 (retail value) of inventory and sales aids from Bestline at a cost of $2,995.[3]

[762] A Direct Distributor was under contract to Bestline, and was charged with the responsibility of maintaining adequate inventory supplies for and training Local Distributors within his organization. A Direct derived profit from his own retail consumer sales, from sales to Local Distributors he recruited, and from sales to recruits sponsored by his Local Distributors. A Direct wishing to ascend to the General Distributorship level was required to recruit another Direct who, in turn, was required to purchase Bestline products of approximately $5,000 retail value. In addition, the ascending Direct Distributor was responsible for the purchase of another $5,000 of Bestline products in one calendar month, and was required to pay $600 (later increased to $700) into Bestline's General Training Fund, which entitled him to attend a three-day training program at Bestline's General Distributor School. Because the ascension of a Direct Distributor to a General Distributorship required total product purchases of $10,000, the commission of the sponsoring General Distributor, computed at the rate of 8 per cent, was $800. Thus the ascension of a Direct Distributor to General Distributor always netted the sponsoring General Distributor $800.

A General Distributor was also under contract to Bestline, and was responsible for training, supervising and motivating distributors enrolled under him. The General received an 8 per cent commission on sales of Direct Distributors below him, and was also entitled to a variable Special Incentive Bonus on product sales generated in his distribution chain. This bonus ranged from an estimated $1,200 for a sales volume of $36,000 to $30,000 for a volume of $200,000.[4] In addition, until February, 1972, a General Distributor received a continuing 3 per cent commission on all sales of a distributor he had sponsored who ascended to General Distributor.

In February, 1972, Bestline modified its marketing plan by adding the position of Candidate Direct Distributor. The Candidate was required to purchase $800 of products from a sponsoring General Distributor (for $500); after a minimum of seven days, and upon representation to Bestline that, *inter alia*, he had commenced a training program, had attended training seminars, and would train and

[3] On the Direct Distributor Application furnished by Bestline, the $2,995 payment was broken down as $2,026 for initial inventory of product and sales aids, $528 for the General Distributor's discount, and $441 for administrative and processing costs.

[4] The actual bonus payable was based upon 20 per cent of Bestline's total profit before taxes, and therefore depended upon Bestline's earned annual profits and the total number of General Distributorships in any one year.

assist new distributors he sponsored, the Candidate could ascend to Direct Distributor by purchasing $5,000 of products and sales aid from Bestline at a cost of $2,995. On these transactions the sponsoring General Distributor received approximately $540 in commission.

By letter dated March 17, 1972, the Commission notified Bestline that its compliance report had been rejected. The Commission's letter expressly stated that Bestline's compliance report had been reviewed only insofar as it related to paragraphs 1 and 3 of the Consent Order. Further correspondence from Mr. Pons on May 17, 1972, concerned the alleged noncompliance with paragraphs 4, 6, 7, 10 and 12(a). Negotiations continued, and on June 24, 1972, a Supplemental Compliance Report was filed with the Commission.

The marketing program was again revised on February 28, 1973. The range of the Local Distributor's discount was lowered from 30–52 per cent to 25–35 per cent, thereby increasing the Direct Distributor's maximum profit on sales from 22 to 27 per cent. The Candidate Direct Distributor program was also modified. The Candidate applicant was required to purchase at least $100 of Bestline products, submit retail sales slips totaling $100, and then purchase $5,600 of products and sales aids at a cost of $3,400. A Candidate Direct Distributor was then entitled to purchase Bestline products at a 45 per cent discount, which increased to 52 per cent after 90 days. The recruitment and ascension of a Candidate Direct Distributor netted the sponsoring General Distributor approximately $500 in commission.

For convenience, the Court will refer to the marketing program in effect until Feb[763]ruary, 1972, as the first revised marketing program; the program in effect from February, 1972 to February, 1973, will be referred to as the second revised marketing program; and that utilized after February, 1973, as the third revised marketing program.

On March 8, 1973, in a letter sent to the attention of defendant and addressed to Bestline Products Corporation, the Commission informed Bestline that it had rejected Bestline's compliance report because the post-Consent Order marketing program violated paragraphs 1, 3, 4, 5, 6, 7, 8, 10, 11 and 12 of the Consent Order.

II. *Defendant's Liability*

Preliminarily, the Court must consider defendant's contention that he cannot be held personally liable for alleged violations of the terms of the Consent Order, despite the fact that he signed that Order individually and as an officer of Bestline. Defendant has advanced a multi-pronged argument in support of this contention. He argues first that at no time subsequent to January, 1971, when he resigned as President of the Bestline enterprises, did he "exercise control over the

decision making functions of other Bestline officers * * * [or exercise] the kind of autocratic control necessary to impose individual liability on him for actions carried out by Bestline * * *." Defendant Bailey's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, at 78–79. Defendant's legal theory is clear: The Government must prove that he exercised, in his words, "monolithic", "autocratic" control over Bestline in order for him to be held liable for alleged violations of the Consent Order.

[1–3] Defendant cites no authority in support of that legal theory, and understandably so, for the Court finds it contrary to the weight of judicial authority and to common sense and experience. It is well established that a command to a corporation is binding on those responsible for the conduct of the corporation's affairs. As stated by the Supreme Court:

> A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt. *Wilson* v. *United States*, 221 U.S. 361, 376, 31 S.Ct. 538, 543, 55 L.Ed. 771, 777 (1911).

The underlying purpose of the rule is obvious: "[I]t would seem in cases of this sort to be a futile gesture to issue an order directed to the lifeless entity of a corporation while exempting from its operation the living individuals who were responsible for the illegal practices." *Pati-Port, Inc.* v. *F. T. C.* 313 F.2d 103, 105 (4 Cir. 1963). Indeed, so clear is the principle enunciated in *Wilson* that, in the absence of special circumstances, it is error to include in an order or decree directed against a corporation the corporation's officers in their individual capacities.[5]

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[5] Thus, for example, in *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 434, 65 S.Ct. 373, 396, 89 L.Ed. 322, 372 (1945), although the District Court found numerous violations of the Sherman Act, the Supreme Court held that it was error to direct the prohibitions of the decree against the executives personally. The Court stated:

> "[I]n practically every instance where a corporate defendant is restrained from described action or conduct, these individuals, as individuals, are likewise restrained. Any injunction addressed to a corporate defendant may as various sections of the decree do, include its officers and agents. If the individual defendants are officers or agents they will be comprehended as such by the terms of the injunction. If any of them cease to be such, no reason is apparent why he may not proceed, like other individuals, to prosecute whatever lawful business he chooses free of the restraint of an injunction. On the other hand, if new officers and directors take the places of these defendants, such new agents will automatically come under the terms of the injunction. There is no apparent necessity for including them individually in each paragraph of the decree which is applicable to the corporate defendants * * *."

To be sure, it is not uncommon for orders of the Commission to name corporate officers in their individual capacities, particularly where a relatively small, closely held corporation is charged with unfair or deceptive conduct. The Supreme Court upheld the propriety of this practice in *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 119–120, 58 S.Ct. 113, 116–117, 82 L.Ed. 141, 146–147 (1937), on the grounds that including corporate officers individually may be necessary if the Commission's orders are "to be fully effective in preventing the unfair competitive practices which the Commission had found to exist." *Id.* at 120, 58 S.Ct. at 117, 82 L.Ed at 146. Subsequent to that decision many courts have upheld the Commission's decision to name corporate officers individually when circumstances so mandate, as, for example, when the corporate official personally directed the corporate activities and formulated its policies, or directly participated in the unlawful activity, or was the sole or one of few stockholders, or

(Continued)

As the Commission itself has em[764]phasized, "If acts are done as an officer they are done for the corporate respondent, and the order against the corporation will run against the officer as an officer." *The Lovable Co.*, CCH Trade Reg.Rep. ¶ 17282 (F.T.C. Docket No. 8620, June 29, 1965).

Nor can one be heard to argue, as defendant does here, that because one lacked absolute control over a corporation, one cannot be held to account for the corporation's conduct. Defendant places great emphasis upon what he characterizes as the diffuse, rather informal character of Bestline's decision-making process, arguing that no person should be held individually liable for decisions reached collectively through informal concensus. Were defendant's position to prevail, virtually all corporate officers could escape liability—of all kinds—for the acts of their corporation simply by arguing that each individually lacked authority to direct the corporation's affairs. The Supreme Court has explicitly rejected such a contention:

> When one accepts an office of joint responsibility, whether on a board of directors of a corporation, the governing board of a municipality, or any other position in which compliance with lawful orders requires joint action by a responsible body of which he is a member, he necessarily assumes an individual responsibility to act, within the limits of his power to do so, to bring about compliance with the order. It may be that the efforts of one member of the board will avail nothing. If he does all he can, he will not be punished because of the recalcitrance of others. [Citation omitted.] But to hold that, because compliance with an order directed to the directors of a corporation or other organization requires common action by several persons, no one of them is individually responsible for the failure of the organization to comply, is effectually to remove such organizations beyond the reach of legislative and judicial commands. *United States* v. *Fleischman*, 339 U.S. 349, 356–357, 70 S.Ct. 739, 743, 94 L.Ed. 906, 911 (1950).

[4] Thus it is clear that if defendant was, in the words of the Supreme Court, "officially responsible" for the conduct of Bestline's affairs, and if he prevented Bestline from complying with the Commission's Order or "fail[ed] to take appropriate action within [his] power for the performance of the corporate duty," *Wilson* v. *United States*, *supra*, 221 U.S. at 376, 31 S.Ct. at 543, 55 L.Ed. at 777, then he is liable for Bestline's alleged noncompliance with the Commission's Order.

It is undisputed that from 1966 to 1970 defendant was President of

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otherwise gave the Commission reason to believe that an order against the corporation alone could be easily evaded. *See, e.g., Benrus Watch Company* v. *F.T.C.*, 352 F.2d 313, 324–325 (8 Cir. 1965); *Rayex Corporation* v. *F.T.C.*, 317 F.2d 290, 296 (2 Cir. 1963); *Puti-Port, Inc.* v. *F.T.C.*, *supra*, 313 F.2d at 105; *Surf Sales Company* v. *Federal Trade Commission*, 259 F.2d 744, 747 (7 Cir. 1958); *Tractor Training Service* v. *Federal Trade Commission*, 227 F.2d 420, 425 (9 Cir. 1955), *cert. denied*, 350 U.S. 1005, 76 S.Ct. 649, 100 L.Ed. 867 (1956); *Consumer Sales Corp.* v. *Federal Trade Commission*, 198 F.2d 404, 407–408 (2 Cir. 1952), *cert. denied*, 344 U.S. 912, 73 S.Ct. 335, 97 L.Ed. 703 (1953); *Steelco Stainless Steel* v. *Federal Trade Commission*, 187 F.2d 693, 697 (7 Cir. 1951); *Gelb* v. *Federal Trade Commission*, 144 F.2d 580, 581 (2 Cir. 1944); *Sebrone Co.* v. *Federal Trade Commission*, 135 F.2d 676, 678 (7 Cir. 1943). *See generally*, Whiting, "Antitrust and the Corporate Executive," 47 Va.L.Rev. 929, 967–972 (1961).

the Bestline [765] corporations and Chairman of their boards of directors, and that during that period he did "formulate, direct and control the acts and practices" of the corporations. Agreement Containing Consent Order to Cease and Desist, *supra*, at 1. It is also undisputed that in January, 1971, Mr. David L. Eastis was promoted from Special Assistant to the President to President of Bestline. Thereafter, defendant continued in Bestline's employ as "Founder" and Chairman of the Board, for which he received $1,432,367 in wages and salaries during the period January, 1971 through July 31, 1973.[6] Defendant's responsibilities during that period were described by him at length in a deposition taken on December 17 and 18, 1973, and, more briefly, in an affidavit executed on November 26, 1975. Defendant characterizes his role at Bestline as that of a relatively uninvolved "elder statesman", serving as "an image of goodwill for the corporation". But his own testimony belies that characterization. His testimony shows unmistakably that subsequent to January, 1971, although he ceased to participate in the day-to-day management of the corporation, he remained active in the forumlation, direction and review of major corporate policies.[7] His testimony also shows that he was actively involved in discussing and approving the specific changes in Bestline's marketing programs undertaken in response to the Commission's Consent Order;[8] indeed, defendant has admitted that between November 3, 1971, and August 31, 1973, he "was aware of and approved each and every change, amendment, modification, or

[6] During the same period defendant also received $339,593 from Bestline for rents, royalties, interest and dividends, and an additional check in the sum of $100,000. On or about July 1, 1973, Bestline Products, Inc., also paid to the State of California the $250,000 penalty imposed on defendant individually by the court in *People of the State of California* v. *Bestline Products, Inc., et al.*, No. C-2842 (Sup.Ct.Cal., May 12, 1971). The data concerning the wages, salaries and other compensation Bestline paid defendant are detailed in Defendant's Answers to Plaintiff's Request for Admissions, Nos. 11–15.

[7] Defendant testified that after he resigned as President, he "pulled completely away from the day-by-day operation of the company." Nevertheless, he stated that Eastis routinely presented him with problems confronting Bestline: "[T]here were certain kinds of broad policy decisions I was always presented with. Day to day, as to whether they should fire somebody in Chicago, or give somebody a raise, a secretary, that I didn't hear about. David [Eastis] had that authority, and he knew it." Deposition of William E. Bailey, December 17, 1973, at 25–27. Defendant further testified that as Founder and Chairman of the Board his counsel and advice were sought by Bestline's other executives; that he met frequently—at least once a week—with Eastis; and that he regularly attended meetings of Bestline's Executive Committee, "a very loose group of people who would normally be involved in any major policy decision that was going to be made." *Id.* at 26 and 14.

[8] On that point, defendant testified as follows:

> "[T]hose discussions [concerning revisions in Bestline's Information Manual, in which the company's marketing program is described] went on, and on, on an almost constant basis. And whether it was three people, or four people, of five people, we would meet at the Hill House—I remember some meetings. They started at 9:00 in the morning and ended up at 10:00 at night, because you have everyone trying to get it into a form which will comply and, by the same token, allow us to continue in business. * * *
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> "I can't tell you how many, but the thrust to cause the literature, the thrust to cause the marketing plan to change, the thrust to get language which would comply with the order, yet not be so technical that, in fact, you destroy the very thing you are trying to say, that was almost a constant one, and that went on—hell, that was almost daily." *Id.* at 117–118.

Defendant also stated that, "I did not personally become involved in compliance matters such as the rewriting of the Bestline Business Opportunity Booklet, the opportunity meeting scripts, the information manual and other literature. *After the work on those was completed I did review them for suggestions or additions.*" Affidavit of William E. Bailey, at 3–4 (emphasis added).

alteration of the Bestline Products, Inc., marketing program." Defendant's Answers to Plaintiff's Request for Admissions, No. 56.

[5] In the opinion of the Court, defendant's own testimony and admissions, as set forth above, clearly show that from the **[766]** time defendant resigned as President of Bestline until he left the company's employ in August, 1973, he continued to function within the corporate hierarchy as a senior executive who participated in the formulation of major corporate policies, and who helped to revise and ultimately approved Bestline's post-Consent Order marketing programs. This is not a case where a formerly controlling corporate officer withdrew so substantially from on-going participation in the conduct of the corporation's affairs that the responsibility for compliance with the Commission's Order necessarily fell on the shoulders of others. In short, defendant's own testimony establishes that he was among those Bestline executives who were "officially responsible for the conduct of [the corporation's] affairs." *Wilson* v. *United States*, *supra*, 221 U.S. at 376, 31 S.Ct. at 543, 55 L.Ed. at 777. Defendant cannot escape the consequences of that responsibility simply by arguing that he chose to remain uninvolved in the day-to-day operations of the corporation and did not personally redesign Bestline's marketing programs.

Also significant, in the opinion of the Court, is the fact that defendant was one of only two corporate officers who signed the Consent Order in an individual capacity. The Court is, of course, aware that the primary reason the Commission names a corporate officer individually in an Order directed to the officer's company is to prevent him from attempting to evade the Order in his individual capacity, that is, outside the corporate structure.[9] However, it does not then follow, as defendant argues, that as long as the officer does not seek to operate outside the corporation he remains immune from liability under the Order. As an individual signatory to the Order, defendant was personally bound by its terms and would remain so until such time as either the Commission or the courts saw fit to modify the obligations the Order placed upon him. The conduct expected of defendant *as an individual* was thus, at a minimum, coextensive with that demanded of him as a corporate officer responsible for Bestline's affairs.

The law is clear that defendant, as a corporate official responsible for the conduct of Bestline's affairs and as an individual signatory to the Consent Order, was under an affirmative obligation to act to insure compliance by Bestline with the Commission's Order, *In re Dolcin Corporation*, 101 U.S.App.D.C. 118, 247 F.2d 524, 534 (1956), *cert.*

[9] The Court notes, without comment, that an additional purpose for naming individuals in a Consent Order may well be "to establish and emphasize the personal liability of individuals who are instrumental in the formation of corporate policy for the compliance of the corporate entities which they direct." Affidavit of William J. Marschalk [the Commission staff attorney who represented the Commission in negotiations with defendant], at 2.

denied, 353 U.S. 988, 77 S.Ct. 1285, 1 L.Ed.2d 1143 (1957); *United States* v. *Greyhound Corporation*, 363 F.Supp. 525, 572 (N.D.Ill.1973), and can be held liable for failure to fulfill that obligation adequately. As the court explained in *In re Dolcin Corporation*, *supra*, 247 F.2d at 534, with reference to a decree of the court,

> • • • [T]his court did not impose an obligation on Shimmerlik and Wantz that they could discharge by remaining inert. We imposed an affirmative obligation upon them, individually and as officers of Dolcin, to take all reasonable steps to effect compliance with this court's order. Those steps included, at least, that they become currently informed of the advertising conduct of Dolcin. That their "articulations" to van der Linde might have been unavailing does not relieve them of the responsibility to make those articulations. And we are not prepared to predict that such efforts, had they been made, would have been "meaningless." Whatever the order of this court directed Shimmerlik and Wantz to do, it did not permit them to stand idly by while the Dolcin Corporation—their corporation—continued to flout our order. • • •
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> [767] Were we to take the opposite view, we would be putting a premium on ignorance and offering a sanctuary for those remiss in performing their duties as corporate officers. See *Fleischman*, supra, 339 U.S. at page 364, 70 S.Ct. at page 746 [94 L.Ed. 906]. Shimmerlik and Wantz should not be permitted to use their own inertia as a shield against the force of this court's decree.

See also United States v. *Greyhound Corporation*, *supra*, 363 F.Supp. at 572–573.

[6] The Court is unpersuaded by either of defendant's affirmative defenses. He asserts that he cannot be held personally liable for alleged violations of the Consent Order because he signed the Order under a mistake of fact, "believing that his signature bound him to Bestline's activities only in his official capacity." He further argues that he signed the Order under a mistake of law, "in that he believed that his individual signature would not bind him to strict liability for any and all activities of the Bestline corporations which might be found violative of the order." Defendant Bailey's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, at 82.

Both of these purported defenses focus exclusively upon the circumstances surrounding defendant's decision to sign the Consent Order in his individual capacity. However, the Court has stated that, in its opinion, defendant can be held liable for alleged violations of the Consent Order solely by virtue of his position as a senior officer responsible for Bestline's affairs and irrespective of his status as an individual signatory to the Consent Order. Even were this not the law, the Court finds no merit in defendant's affirmative defenses. None of the affidavits before the Court in any way suggests that the Commission induced defendant to sign the Consent Order, either as a corporate officer or individually, under an express or implied promise

of immunity from civil penalties. In essence, defendant asks this Court to relieve him of liability under the Consent Order because he misunderstood the nature and extent of that liability. This the Court will not do. As explained by the Court of Appeals for the Eighth Circuit with reference to a consent decree issued in an antitrust case,

> Simply because a party misconstrues its lawful obligations under such decrees, it is not afforded a legal defense if in law that interpretation turns out to be erroneous. Misunderstanding of the law is no more an excuse under the Clayton Act than anywhere else. In effect, the argument proffered here is similar to the defendant's contention, urged more emphatically in the district court under Count II, that it acted in good faith. We think, as did the district court, that if this has any relevancy at all it is a factor to be considered by the trial court only in measuring or mitigating the penalty. *United States* v. *Beatrice Foods Co.*, 493 F.2d 1259, 1269 (8 Cir. 1974), *cert. denied*, 420 U.S. 961, 95 S.Ct. 1350, 43 L.Ed.2d 438 (1975).

The Court holds that, based solely on the facts to which defendant has testified, the law charged defendant with the responsibility of insuring that Bestline's marketing program complied with the Commission's Order, and that defendant can be held liable for the failure of Bestline's marketing program so to comply.

III. *Compliance with the Consent Order*

The cross motions for partial summary judgment presently before the Court are directed only to the first of the 142 counts contained in the First Amended Complaint. Count One charged defendant with violations of paragraphs 1, 3, 4, 5, 6(a) and 12(a) of the Consent Order. Each of these alleged violations will be considered separately, except that the Court will follow the parties' lead in discussing paragraphs 1 and 3 together.

A. *Paragraphs 1 and 3*

As set forth in footnote 2 herein, paragraph 1 of the Consent Order directed the respondents to cease and desist from operating a multi-level marketing program [768] wherein the financial gains to the participants "are dependent upon the continued, successive recruitment of other participants." Paragraph 3, in turn, proscribed the payment of any consideration to any participant in Bestline's marketing program unless that participant "performs a bona fide and essential supervisory, distributive, selling or soliciting function in the sale and delivery of such products to the ultimate consumer."

As noted in Part I of this Memorandum, the parties negotiated at length concerning the precise language to be included in the Consent Order. The parties disagree sharply on whether those pre-Consent Order negotiations are admissible for the purpose of construing the

Consent Order and determining whether defendant has complied therewith. The Government argues, with citation to *United States* v. *Armour & Co.*, 402 U.S. 673, 682, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256, 263 (1971), and *United States* v. *Beatrice Foods Co., supra*, 493 F.2d at 1264, that the commands of a consent order must be found "within its four corners", *Armour, supra*, 402 U.S. at 682, 91 S.Ct. at 1757, 29 L.Ed.2d at 263, and that when, as here, the language of the Consent Order is unambiguous, inquiry into extrinsic matters is clearly improper. Defendant, on the other hand, maintains that paragraph 1, and in particular the word "dependent", is ambiguous and requires reference to parol evidence. The Court is permitted to resort to such evidence, defendant argues, in light of the Supreme Court's recent decision in *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 95 S.Ct. 926, 43 L.Ed.2d 148 (1975). In that case, the Court sanctioned reference to the parties' negotiated "Agreement Containing Consent Order to Divest and to Cease and Desist", to an appendix incorporated by reference in that agreement, and to the complaint, as "aids to the construction of the order and of the agreement of which it is part." *Id.* at 238, 95 S.Ct. at 935, 43 L.Ed.2d at 163. The Court explained:

> Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree.[11]
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> [11] "Assuming that a consent decree is to be interpreted as a contract, it would seem to follow that evidence of events surrounding its negotiation and tending to explain ambiguous terms would be admissible in evidence." Handler, *supra*, n. 10, at 23 n. 148. *Id.* at 238, 95 S.Ct. at 935, 43 L.Ed.2d at 162.
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> Such reliance does not in any way depart from the "four corners" rule of *Armour*.

* * * * * * *

In the instant case a key issue—and one which the parties have exhaustively briefed and argued—is the construction to be accorded the phrase in paragraph 1, "dependent upon the continued, successive recruitment of other participants." The Government contends that "dependent" means "dependent *in any manner*" (emphasis in original), Plaintiff's Memorandum in Opposition to Defendant Bailey's Motion for Partial Summary Judgment, at 11, and includes "*both* 'partially dependent' and 'wholly dependent,' " Plaintiff's Reply Memorandum in Support of Its Motion for Partial Summary Judgment, at 3. Defendant, however, argues that when paragraphs 1 and 3 are construed together, "dependent" must be taken to mean "necessarily dependent", that is, "where the fortunes of the investor are necessarily dependent on a system of recruiting and there is no way for him to recoup his investment and make a profit." Defendant Bailey's

Memorandum in Opposition to Plaintff's Motion for Partial Summary Judgment, at 22. Defendant, in effect, contends that paragraphs 1 and 3 prohibit participants from receiving "financial gains from recruiting others without performing a useful function in distributing or selling a product to the ultimate consumer." *Id.* at 22. But where they perform "a bona fide and essential supervisory, distributive, selling or soliciting function in the sale and delivery of such products to the ultimate [769] consumer," Consent Order, paragraph 3, then, defendant maintains, the marketing program complies with the Consent Order *even if* the participants also are compensated for performing a recruiting function. In its briefs and during oral argument, the Government construed defendant's position to be that "dependent" means "solely" or "exclusively" dependent. The Court feels that this is a fair reading of defendant's argument.

[7] The Court has carefully considered the arguments advanced by the parties in support of their alternative constructions to paragraph 1 and concludes that even when that paragraph is read in light of the Consent Order as a whole and the complaint incorporated by reference therein, its language remains reasonably susceptible to any of the interpretations—dependent "in any manner," "partially" dependent, "wholly" dependent, "necessarily" dependent, or "exclusively" dependent—the parties have proposed. Simply put, the Court agrees with defendant that on its face paragraph 1 is ambiguous and that that ambiguity cannot be resolved without the aid of extrinsic evidence.

As originally drafted, paragraph 1 of the proposed Consent Order directed the respondents to cease and desist from

> 1. Operating or, directly or indirectly, participating in the operation of any multi-level marketing program wherein the financial gains to the participants are dependent *in any manner* upon the continued, successive recruitment of other participants. (Emphasis added.)

By letter dated October 23, 1970, Bestline's counsel requested deletion of the words "in any manner" from that paragraph. Counsel's letter read in pertinent part:

> In paragraph 1 of the Order (page 3), the phrase "in any manner" has been deleted. We have agreed that no financial gains shall be dependent upon recruiting nor, as in paragraph 2, shall any compensation be paid for recruiting. The phrase "in any manner" is surplusage at best and affords the Commission no additional powers. At worst, however, the phrase could be interpreted as emphasis designed to connote an absolute prohibition of recruiting, including the necessary, proper and *uncompensated* recruitment of replacement sales personnel. We merely ask the Commission to take notice of the fact that sales personnel in all industries are somewhat temporary and mobile. No company can long survive without recruitment. The proposed language was intended, and the proposed change herein is equally designed, to prohibit the alleged practice of compensating investor-salesmen personnel "participants") for any recruiting function they may perform. (Emphasis in original.) Letter from Micah H. Naftalin of Elliott &

Naftalin to Hon. Joseph W. Shea, Secretary, Federal Trade Commission, October 23, 1970, at 3.

Following receipt of that letter, the Commission acquiesced in the deletion of the words "in any manner."

The Court believes that Mr. Naftalin's letter establishes beyond doubt that the deletion of the phrase "in any manner" from paragraph 1 of the proposed Consent Order—a phrase that Mr. Naftalin himself termed "surplusage"—effectuated no substantive change in the scope of the Order and was designed solely to eliminate the possibility that Bestline's "necessary, proper and *uncompensated* recruitment of replacement sales personnel" might later be found to violate the terms of the Consent Order. The clear thrust of Mr. Naftalin's comments is that compensation would *not* be paid for recruitment. As he wrote, "The proposed language was intended, *and the proposed change herein is equally designed*, to prohibit the alleged practice of compensating investor-salesmen personnel ('participants') for *any* recruiting function they may perform." (Emphasis added.) In the opinion of the Court, Mr. Naftalin's letter shows that he was concerned, and legitimately so, that the Consent Order not prohibit Bestline from continuing its routine replacement of personnel, a necessary and vital activity for any company and particu[770]larly for a company engaged in consumer sales. As Mr. Naftalin emphasized, no business organization can long survive if prevented from hiring replacement personnel, or from hiring personnel needed for legitimate expansion. Thus the continued financial rewards of all employees are, in a sense, indirectly and remotely "dependent" upon "recruitment" of new personnel. It was the right to undertake that type of innocent, uncompensated recruitment, and only that type, that Mr. Naftalin sought to preserve, and succeeded in preserving, for Bestline. But as Mr. Naftalin's letter makes explicit, with the exception of that kind of recruitment, *"no financial gains shall be dependent upon recruiting* * * *." (Emphasis added.)

In light of these negotiations, the Court finds defendant's proposed interpretation of paragraph 1 incredulous. Having secured the Commission's agreement to delete the phrase "in any manner" from the Consent Order on the express representation that it was "surplusage" and that retaining that phrase would afford the Commission "no additional powers", defendant now attempts to persuade the Court that for the Government "to read 'in any manner' back into the order, notwithstanding its express deletion * * *" is "incredible". Reply Memorandum of Points and Authorities in Support of Bailey's Motion for Summary Judgment, at 4, and Memorandum of Points and Authorities in Support of Bailey's Motion for Summary Judgment, at 21. On the contrary, the Government's construction of

paragraph 1 is in all respects consistent with both the language of the Consent Order and the history of the parties' negotiations. In particular, when the language of paragraph 1 is interpreted as the Government suggests to prohibit the payment of compensation which is directly dependent in any manner upon recruitment, then that paragraph tracks smoothly and logically with the requirement set forth in paragraph 3 that compensation can be paid only for a bona fide and essential supervisory, distributive, selling or soliciting function.

[8] Accordingly, the Court concludes that paragraphs 1 and 3 prohibit the operation of a marketing program wherein participants are directly compensated for any recruiting functions they may perform, irrespective of whether they are also compensated for performing a useful function in the distribution or sale of product to the ultimate consumer. The Consent Order, however, does not proscribe the payment of compensation for the performance of such a bona fide and essential distributive or selling function, nor does it proscribe the *un*compensated recruitment of marketing program personnel or the indirect, remote financial gain that may accrue as a result of routine hiring of personnel.

The Court has reviewed the evidentiary materials submitted by the parties, in particular the Bestline Business Opportunity Booklets, the Bestline Information Manuals, and the opportunity meeting scripts.[10] We now turn to several features of the post-Consent Order marketing programs described in those materials which may possibly violate paragraphs 1 and 3 of the Order:

1. As set forth in Part I of this Memorandum, in each of the post-Consent Order marketing programs the discount at which a Local Distributor bought from Bestline varied according to the total volume of product purchased each month. That volume was composed of his own direct sales to consumers plus the sales orders of all other Local Distributors he had "sponsored" and "assisted". Similarly, a Direct Distributor received commission on product orders of all Local Distributors whom he had sponsored and assisted, and a General Distribu[771]tor, in turn, earned an 8 per cent commission on all product orders of those in his chain of distribution.

2. If a Local Distributor who had originally been sponsored by a General Distributor chose to ascend to a Direct Distributorship by pre-purchasing approximately $5,500 worth of inventory and sales aids, the sponsoring General received an 8 per cent commission, ranging from

[10] Bestline's marketing programs are described in detail in these materials. Because the marketing program was revised on several occasions following the entry of the Consent Order, the parties have submitted three distinct sets of materials. The first sets forth the first revised marketing program as of November 10, 1971, the date on which Bestline submitted its Compliance Report to the Commission. The second, reflecting changes made in the marketing program in February, 1972, describes the second revised marketing program, and the third incorporates changes made in February, 1973.

approximatly $400 to $540, depending upon the marketing program in effect at the time.

3. A Direct Distributor could not ascend to a General Distributorship without first finding another individual to replace him as a Direct; that individual was required to generate $5,000 of product orders in one month, netting the sponsoring General $400 commission.

4. Under the first revised marketing program, a General Distributor continued to receive a continuing 3 per cent commission on the sales volume of any of his Direct Distributors who advanced to the position of General Distributor.

That participants at all levels of the marketing program gained financially from sponsoring and assisting other participants is undisputed; what remains in contention is whether that gain stemmed from the kind of "recruitment" proscribed by paragraph 1 of the Consent Order, as the Government maintains and defendant denies.

In support of his position, defendant points to the obligations placed upon all participants in the marketing program to train, supervise, motivate and assist those in their chain of distribution in the sale of product. For example, a Local Distributor who sponsored another Local Distributor acted as an intermediary between that Local and their Direct Distributor, collecting product order forms from the sponsored Local, forwarding them to the Direct, and channeling product from the Direct to the Local. The Direct Distributor, in turn, was required by contract "to maintain a sufficient inventory of the various products so as to be able to meet the requirements of his [local] distributors and customers." Bestline Direct Distributor Agreement, utilized prior to February, 1972, ¶ 26; later contracts obligated the Direct "to provide such management, inventory, supplies, training and assistance as is reasonably required by any and all local distributors with whom he has contracted." Bestline Direct Distributor Agreement, utilized February, 1972 to February, 1973, ¶ 6. A General Distributor, although not directly involved in the distribution of product, was similarly obligated. Bestline General Distributor Agreement, utilized February, 1972 to February, 1973, ¶ 8. He was also bound "to conduct sales courses designed to assist his distributors, both Direct and local, in the best use and application of Bestline products and the methods of salesmanship most appropriate to accomplish the sale of these products to the ultimate consumer." *Id.* ¶ 7. In short, defendant argues that these obligations to supervise, train and maintain inventory for those in one's chain of distribution clearly show that any financial gain received was for the performance of a bona fide and essential function in the distribution and sale of product to the ultimate consumer, and not for recruitment.

The Government, on the other hand, argues that these purported

obligations existed on paper only and were but a sham to disguise the fact that participants continued to be rewarded for recruiting others into Bestline's marketing structure. Indeed, it is the Government's position that recruitment remained the main thrust of Bestline's marketing program and the principal objective and source of remuneration for participants therein. The Government urges the Court to reject defendant's argument that all financial gains were earned for the performance of bona fide and essential marketing functions. In the Government's view, the purported existence of those functions cannot correct the marketing programs' continuing failure to eliminate the accrual of financial gain to participants which was dependent upon recruitment. Moreover, the Government maintains that those supervisory and training [772] functions would not even satisfy the requirement of paragraph 3 since they were not essential to the sale and delivery of product to the *ultimate* consumer.

[9] The Court agrees with the Government. As the Court has already concluded, paragraph 1 of the Consent Order prohibited participants from receiving financial gains which were directly dependent in any manner upon recruitment. Here the undisputed facts of record show that a participant, whether a Local, Direct or General Distributor, benefitted financially from persuading others to join the Bestline marketing structure and enter his chain of distribution. Particularly egregious, in light of the requirements of the Consent Order, was (1) the $400 to $500 commission paid to a General when a Local he had originally sponsored chose to ascend to Direct by prepurchasing approximately $5,500 worth of inventory and sales aids and (2) the additional $400 commission a General received because a Direct wishing to ascend to General was required to locate another individual responsible for the purchase of $5,000 of product in one month. Also directly violative of the terms of paragraph 1 was the continuing 3 per cent commission payable under the first revised marketing program to a General when any participant previously within his chain of distribution ascended to General Distributor.

[10] Moreover, the Court is not persuaded by defendant's argument that all participants regularly and actively supervised, trained, motivated and assisted those that they "sponsored." The Court repeats that, even were that in fact the case, it would not serve to excuse noncompliance with paragraph 1 of the Consent Order. However, the Court doubts strongly whether participants in Bestline's marketing program viewed their supervisory and training responsibilities as seriously as defendant maintains. To be sure, this question in one of fact, incapable of final resolution within the context of cross motions for partial summary judgment. There are several factors, though, contributing to the Court's doubts. For example, as the Government

has emphasized, Bestline had no mechanism to enable it to determine routinely whether a participant performed the required supervisory and training functions, nor would one who failed to perform those functions be terminated by the corporation. Deposition of David L. Eastis in *People of the State of California* v. *Bestline Products, Inc.*, No. 952969 (Sup.Ct.Cal., June 20, 1972), at 74. Furthermore, there were no limits on the number of Local Distributors an individual Local Distributor could sponsor, or on the number of Local Distributors a Direct Distributor could sponsor. Nor was there any geographic limitation on the location of participants one sponsored. As stated in Bestline's Information Manual at page 28, and in later editions at page 23, "you may sponsor people anywhere in the country, and regardless of where they are you will make a profit on their activities, by your continued supervision." Common sense would seem to indicate that the nature and extent of the supervision rendered would become increasingly tenuous and ephemeral as a participant's sales organization became larger and more diffuse. The question is really one of degree. Even were the Court to have adopted defendant's position, at a certain point those purported "bona fide and essential" functions would have become so insignificant that, as a matter of law, they would have been deemed *de minimis* and incapable of supporting even the argument advanced by defendant. If, for example, Local A sponsored Local B, who in turn sponsored Local C and so on to Local G, *quaere* the nature and extent of supervision and assistance rendered by Local A to Local G, or the degree of supervision provided by their Direct or General. *Quaere* also the kind of "necessary and continuing supervision, and sales assistance" a General Distributor provided to another General formerly within his own distribution network so as to justify the continuing 3 per cent commission permitted the former on the latter's sales in the first revised marketing program.

An even more fundamental flaw in defendant's argument—and one more readily [773] cognizable in the present procedural posture of this case—is the fact that the supervisory and training functions purportedly rendered by the participants in Bestline's marketing program were not necessarily essential in the sale and delivery of product to the *ultimate* consumer, as required by paragraph 3 of the Consent Order. When, for instance, an individual opted to become a Direct Distributor by pre-purchasing $5,000 worth of inventory and sales aids, the sponsoring General received a commission of 8 per cent. Yet at that stage in the transaction, no product has yet been sold or delivered to the ultimate consumer. The sale was transacted entirely be persons within Bestline's own marketing structure. Further, it is conceivable that the process would continue on a lower level when the pre-purchase Direct re-sells his inventory to Locals he has sponsored, still without a

sale to an ultimate consumer. Despite the lack of such a sale, the General has received $500 in commission.

This is not to say that Bestline did not emphasize the sale of its product to the consuming public. The record clearly shows that the Bestline enterprises generated millions of dollars in retail sales annually. Rather, Bestline's post-Consent Order marketing programs failed to comply with paragraph 3 of the Consent Order by continuing to permit sponsoring distributors to receive consideration in the absence of the sale and delivery of product to the ultimate consumer. Alternatively phrased, sales and delivery of product to the ultimate consumer was not a necessary condition for either the pre-purchase Direct Distributor or the General Distributor to receive financial gain. Accordingly, the Court holds that defendant violated paragraphs 1 and 3 of the Consent Order during the period November 3, 1971, to July 31, 1973.

B. *Paragraph 4*

Paragraph 4 of the Consent Order directed respondents therein, *inter alia*, to cease and desist from

> Requiring prospective participants or participants in respondents' said program to purchase the product or pay any other consideration, other than payment for the actual cost of necessary sales materials, in order to participate in any manner therein; * * *.

The Government contends that Bestline's post-Consent Order marketing programs violated the quoted portion of that paragraph by

1. Requiring Direct and General Distributors to pay $25 and $50 a month, respectively, to belong to a marketing co-op;
2. Requiring a Direct Distributor to pay $600 (later increased to $700) to a General Training Fund upon ascending to General Distributor;
3. Requiring new Local Distributors to pay an initial entrance fee of $5; and
4. Allocating $969 of the $2,995 paid by a pre-purchase Direct Distributor for the sponsoring Distributor's discount ($528) and administrative costs ($441), thereby leaving only $2,026 for the purchase of inventory and sales aids.

Defendant argues that

1. Co-op dues were at all times voluntary;
2. The required General Training Fund payment does not come within the scope of paragraph 4 since "it was not required of one desiring to participate in the Bestline marketing program" (Defendant Bailey's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, at 50);
3. The $5 entrance fee is *de minimis*, and in any event comes

within the express exception in paragraph 4 for "actual cost of necessary sales materials";

4. The $528 discount[11] was not prohibited by paragraph 4; and

5. Administrative and processing costs incurred in the operation of the pre-purchase Direct Distributor program merely reflect cost of product.

[774] First, with respect to the monthly co-op dues, the evidentiary materials submitted by the parties clearly establish that these dues were obligatory for Direct Distributors under the first revised marketing program. The Bestline Business Opportunity Booklet utilized while that program was in effect, that is, until February, 1972, explained to prospective participants that:

> Your monthly operating expenses are minimal in Bestline. Almost all our distributors use their homes as their place of business. You most likely will require a car, a telephone and should comply with local and state sales laws. *Direct Distributors are required to pay $25 per month CO-OP dues* which defer expenses for hotel meeting and training rooms. *Id.* at 8 (emphasis added).

A Direct Distributor was explicitly bound by the terms of that booklet by paragraph 33 of the contemporaneous Direct Distributor Agreement, which provided as follows:

> Distributor acknowledges that he has heretofore received a copy of the Bestline Business Opportunity Booklet and has signed a written receipt for the same. Said booklet is hereby referred to and by such reference incorporated herein and made a part hereof. The terms of said booklet are binding upon the parties hereto as a part of this contract.

[11] In the opinion of the Court, these materials establish beyond doubt that, at least until February, 1972, a Direct Distributor was contractually obligated to pay $25 per month co-op dues "in order to participate" in Bestline's marketing program. Under the first revised marketing program these dues were not voluntary as Defendant has argued; nor were they paid for the purchase of product or "necessary sales materials". Therefore, the Court holds that the $25 monthly co-op dues required of a Direct Distributor under the first revised marketing program constituted a violation of paragraph 4 of the Consent Order.

In all other respects, however, the Government has failed to persuade the Court that participation in Bestline's marketing program was conditioned upon the payment of co-op dues. Subsequent to February, 1972, the Bestline Business Opportunity Booklet was revised, stating only that "Distributors *usually* join a local Co-Op, paying monthly dues of $25 for a Direct Distributor and $50 for a General Distributor." *Id.* at 8 (emphasis added). In its brief, the Government points to the following language included in the

[11] While the Direct Distributor Application referred to the $528 as "General Distributors discount", both the Government and defendant referred to it as a commission.

opportunity meeting scripts in support of its contention that the payment of co-op dues remained compulsory:

> We, as General Distributors, belong to the Co-op and pay $50 per month dues (a Direct pays only $25) which pays for the expenses of our meeting rooms and training sessions which is truly an economical expense for overhead. We conduct meetings like you saw last night and this morning on a continuous basis right here in ——————. And, because you are a member of the Co-op, you use this way to introduce your guests to Bestline, attend Saturday training sessions, retail schools, local schools and our family night functions and it's quite effective.
>
> So, let's say that you do that.

Although that language is strongly suggestive and may have induced a prospective participant into believing that co-op dues were mandatory, the Court is unwilling to hold as a matter of law that that necessarily occurred and, therefore, that paragraph 4 was further violated.

[12] Second, with respect to the $600–$700 payment to the General Training Fund, it is defendant's position that that payment did not violate paragraph 4 since a Direct Distributor could continue to participate indefinitely in Bestline's marketing program as a Direct, thereby avoiding having to attend Bestline's General Distributor School. To be sure, only when a Direct voluntarily chose to become a General was the $600–$700 Training Fund payment required. But defendant's argument really begs the question. Paragraph 4 of the Consent Order explicitly prohibits Bestline from requiring participants to pay *any* consideration, other than for the actual cost of [775] necessary sales materials in order to participate *in any manner* in Bestline's marketing program. The Court cannot imagine any more inclusive language than that used in the Consent Order. Participation as a General Distributor is clearly encompassed by the phrase "in order to participate in any manner." Defendant's interpretation of paragraph 4 is thus totally inconsistent with the plain language of that paragraph. Accordingly, the Court holds that the $600–$700 payment to the General Training Fund admittedly required of a Direct who wished to ascend to General Distributor violated paragraph 4 of the Consent Order.

[13] Third, the Court agrees with defendent that the $5 initial fee required of new participants, purportedly for an Associate Membership in Bestline's Distributors' Association, is *de minimis*. However, the Court wishes to make clear that it expresses no opinion on whether that payment was in consideration for "necessary sales materials" as defendant maintains. There is nothing before the Court that would justify such a finding, save for defendant's own declarations and the similar representation of Bestline in the corporation's Supplemental Compliance Report, submitted to the Commission on June 24, 1972.

[14] The fourth alleged violation of paragraph 4 of the Consent

Order—the allocation of $929 of the $2,995 paid by a pre-purchase Direct Distributor for administrative and processing costs and the General Distributor's commission—presents some difficulty. The Court is inclined to agree with defendant that the $528 commission paid to the sponsoring distributor does not properly fall within the scope of paragraph 4. If, as the Government contends, the commission payable upon the purchase of product by a pre-purchase Direct violated paragraph 4 of the Order, then it would seem to follow logically that all commissions paid—either directly, as here, or indirectly in the form of variable discount rates—whenever a Local or Direct Distributor purchased product from Bestline, were equally violative of paragraph 4, for all would be "consideration [paid] in order to participate in any manner" in Bestline's marketing program. The Court believes, however, that when the Consent Order is taken as a whole, the payment of commissions, discounts and the like is a matter dealt with more directly, and in considerable more detail, in paragraph 3 of the Order. Therefore, the Court declines to stretch the general language of paragraph 4 to prohibit the payment of commission upon the purchase of product.

[15] With respect to the $441 paid for "administrative and processing costs", it is defendant's position that these costs merely reflected a portion of total product cost, "the necessary costs of processing, handling, shipping, and bookkeeping, which are normally incidental to the distribution of products." Defendant Bailey's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, at 52. The circumstances surrounding the administration of the pre-purchase Direct Distributor program, however, belie that contention. Paragraph 4 of the Consent Order provided, *inter alia*, that

> respondents may require or may suggest the purchase of specific and reasonable inventories only, by any distributor, on the express condition that respondents at the same time agree to repurchase any unused and undamaged portion of an initial inventory from any purchaser thereof at full cost less reasonable shipping costs, if any, within 90 days from the delivery of the product at the option of the purchaser * * *.

It is undisputed that from May, 1971 until February, 1972 Bestline operated a 90-day refund program, and that a pre-purchase Direct Distributor requesting a refund automatically received $2,026, less the value of any product used. However, neither the $441 paid for administrative and processing costs nor the $528 commission paid to the General Distributor were refunded. Affidavit of James Hisler, at 2, attached to Defendant's Supplemental Memorandum in [776] Opposition to Plaintiff's Motion for Partial Summary Judgment.[12]

[12] Mr. Hisler's affidavit states that part of his responsibility as manager of operations for Bestline Products, Inc., was the administration of Bestline's 90-day refund program.

The Government has not charged defendant with a violation of paragraph 4's 90-day refund requirement and, for the purposes of this discussion, the Court assumes that the refund program operated by Bestline complied with the Consent Order.[13] Given that assumption, and given the requirement in paragraph 4 that Bestline refund the full cost of initial inventory (less reasonable shipping costs and the value of product used or damaged), the only conclusion logically permissible is that the amount refunded— $2,026—represented the full cost of product inventory. In that case, defendant's contention that the $441 charge was but a part of product cost necessarily fails.

Accordingly, the Court concludes that the requirement that a pre-purchase Direct Distributor pay $441 for "administrative and processing costs" violated paragraph 4 of the Consent Order in that that payment was consideration required for participation in Bestline's marketing program. The Court holds that for the reasons set forth above, defendant failed to comply with paragraph 4 of the Consent Order during the period November 3, 1971, to July 31, 1973.

C. *Paragraph 5*

[16] As set forth in footnote 2 herein, paragraph 5 of the Consent Order prohibited respondents from using a multi-level marketing program wherein the compensation or profit inuring to participants was "dependent on the element of chance dominating over the skill or judgment of the participants"; or where "no amount of judgment or skill exercised by the participant has any appreciable effect" upon his compensation; or where "the participant is without that degree of

[13] The Court notes in passing, however, that the evidentiary materials presently before the Court appear to establish a firm basis upon which to found non-compliance with the 90-day refund requirement. The Government and defendant agree that that issue is not before the Court at this time; it was mentioned neither in the First Amended Complaint, nor in the Government's Motion for Partial Summary Judgment, nor at oral argument. Nevertheless, the affidavit of Mr. Hisler strongly suggests that Bestline's refund program did not comply with the Consent Order until March, 1973.

As outlined in the text, under the first revised marketing program, neither the $441 paid for administrative and processing costs nor the $528 paid to the sponsoring General Distributor were refundable. At a minimum, it would seem that paragraph 4, which required the repurchase of initial inventory "at full cost", mandated that the amount allocated for the General's commission be refunded to the participant if he elected to exercise the 90-day refund option clearly afforded him by the Consent Order.

Furthermore, under the program in effect from February, 1972 to February, 1973, the Candidate Direct Distributor initially purchased $500 of product and then, after a minimum seven-day period, submitted a Direct Distributor application together with $2,995 for additional product. Once the second purchase was made, the sums paid to Bestline became non-refundable. The Court surmises that the split purchase procedure utilized in the second revised marketing program may well have been adopted in reliance upon the final clause of paragraph 4, which provided that

> "if inventory costs reach $500 or more, within said 90 day period, then said obligation to repurchase shall cease immediately upon participant's tendering a subsequent order to purchase the product."

This Court seriously doubts whether the refund procedures utilized between February, 1972 and February, 1973—which appear to have been tailored solely to subvert the spirit, if not the very letter, of paragraph 4—would be deemed in compliance with the Consent Order. It was not until March, 1973, when the third revised marketing program took effect, that a Direct Distributor was entitled to refund of the *full* amount paid for wholesale inventory. Affidavit of James Hisler, at 2.

In light of these facts, the Court utterly fails to comprehend the Government's inexplicable failure to charge defendant with a violation of the 90-day refund requirement set forth in paragraph 4 of the Consent Order.

control over the operation of such plan as to enable him substantially to affect the amount" of his compensation. The Government charges a violation of paragraph 5 in that, as Bestline's marketing programs were structured, [777]

Two factors, over which the participant exercises no control, are vitally significant in assessing one's chances of achieving large financial rewards—(1) time of entry into the marketing program; (2) intensity of pre-entry recruitment efforts. Since a participant cannot exercise control over these two components of profit, the element of chance dominates over skill and judgment in determining a participant's profits. Plaintiff's Motion for Partial Summary Judgment against Defendant Bailey, at 38.

In effect, the Government argues that any program which permits the number of participants to increase geometrically through continued recruitment inevitably results in an increasingly saturated market; that the more highly saturated the market, the more difficult it is for a participant to gain financially; and that the particular level of saturation confronting a participant is a function of factors over which he has no control.

Defendant quite rightly points out that the Government's position is entirely abstract and theoretical. There is nothing before the Court tending to establish the saturation level of any identifiable geographic market at any one point in time or across time. It may well have been the case that the per capita distribution of Bestline participants remained relatively constant over time and, therefore, that time of entry into the Bestline marketing programs had no effect upon a participant's financial gain. Certainly there is nothing to establish that the number of participants increased exponentially. In short, in the absence of any showing of the actual market saturation, there is no basis for holding, as a matter of law, that Bestline's marketing programs as structured violated paragraph 5 of the Consent Order.

D. *Paragraph 6(a)*

The Government contends that Bestline's revised marketing programs failed to comply with paragraph 6(a) of the Consent Order in several respects:

1. Participants were not orally informed that a contract of participation in the program could be cancelled for any reason by notification to Bestline within three working days from the date of its execution;
2. All written contracts did not contain notice of the three-day cancellation right; and
3. Participants were not, in fact, afforded such a right.

Defendant takes issue with each of these contentions.

First, with respect to the oral disclosure requirement, the Govern-

ment relies primarily upon the fact that none of the scripts utilized at opportunity meetings instructed the speaker to inform prospective participants of the cancellation right. Defendant, however, stresses that the scripts specifically directed the speaker to refer the members of his audience to pages 14 and 15 of the Bestline Business Opportunity Booklet,[14] entitled "Policies and Procedures Affecting Distributors," where it was stated that

> Any distributor may for any reason, cancel his contract of participation within three (3) working days from the date such contract was signed, upon written notice to Bestline. Full refund of all monies will be made upon written notice.

The oral reference to that written statement, in defendant's view, satisfies the oral disclosure requirement of paragraph 6(a).

Furthermore, defendant contends that the Government has by no means estab[778]lished that participants were not in fact orally informed of their cancellation right. Defendant admits that the opportunity meeting scripts "were generally adhered to at opportunity meetings." Defendant Bailey's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, at 60. However, he denies that they were "slavishly adhered to" and maintains instead that speakers "often if not always" informed those who attended the meetings of the three-day cancellation right. *Id.* at 60. In support of this contention, defendant has submitted the affidavit of Toro Ikeda, a Bestline officer, who stated, at page 3, that at the opportunity meetings he attended he affirmatively told the audience of the three-day cancellation right. Defendant has also submitted the affidavit of Stephen Meyers, a Bestline General Distributor, who stated, at page 3, "At least 90 per cent of the times I heard it stated at these opportunity meetings that there was a three day cancellation right." These affidavits clearly establish, in defendant's view, that a genuine issue of material fact remains as to whether oral disclosure of the cancellation right was made to all prospective participants.

[17] The Court is not persuaded by defendant's reasoning. In the Court's opinion, an oral exhortation to consult a written publication, at that time not yet even in the hands of the listener, does not as a matter of law satisfy the oral disclosure requirement of paragraph 6(a). Were such an oral cross-reference to be held to constitute oral disclosure, it would seriously dilute the additional emphasis the Commission intended, and defendant consented, to give to the three-day cancella-

[14] The script utilized until February, 1972 contained no such passage. However, the second revised opportunity meeting script included the following language at page 8:

> "Before attending tomorrow's meeting, each of you will want to read the Bestline Business Opportunity Booklet which will be handed out this evening. The booklet contains not only an explanation of some of the things we discussed this evening, but on pages 14 and 15, the rules and regulations which affect all distributors."

The script utilized after February, 1973 contained a virtually identical passage at page 7.

tion right by requiring *both* written and oral disclosure of that important contractual right.

[18] The Court is similarly unpersuaded by defendant's contention that a genuine issue of material fact remains as to whether participants were informed orally of the three-day cancellation right. Paragraph 6(a) of the Consent Order imposed upon defendant the affirmative obligation of operating a marketing program wherein *all* participants would be notified orally and in writing of that right. The simplest manner to assure compliance with that requirement clearly would have been to include in the opportunity meeting scripts an explicit, unambiguous statement setting forth the existence of that right. This defendant chose not to do, relying instead upon the hope that all speakers would deviate from the prepared script and inform participants of their cancellation right. That his decision was risky, and ultimately ill-advised, is highlighted by the evidentiary materials defendant himself has submitted, for even his own affiant, Stephen Meyers, has implicitly conceded that at a certain percentage of the opportunity meetings he attended—perhaps as many as 10 per cent—he cannot recall hearing the required oral disclosure. This evidence alone is sufficient to establish a violation of paragraph 6(a), which requires unequivocally that "all participants" shall be informed orally of the three-day cancellation right.

[19] As for the written contracts of participation Bestline used, the Court does not agree with the Government that the failure to include the three-day cancellation right directly in the General Distributor Agreement used during the first revised marketing program was a violation of paragraph 6(a). That agreement specifically incorporated by reference both the terms of the Direct Distributor contract and of the Bestline Business Opportunity Booklet. General Distributor Agreement, ¶¶ 23 and 26. Both of those documents contained the requisite three-day cancellation clause. *See* Direct Distributor Agreement, ¶ 14(c); Bestline Business Opportunity Booklet, at 15. In the opinion of the Court, the written contracts of participation Bestline used prior to February, 1972, complied with paragraph 6(a) of the Consent Order.

Such is not the case, however, with the Direct and General Distributor Agreements utilized subsequent to February, 1972, because each of those Agreements was made **[779]** self-executing.[15] The inclusion of a self-executing provision completely undermined the

[15] The Direct Distributor Agreement used in the second revised marketing program provided in paragraph 13(c) that for all purposes, including the three-day cancellation right, the contract "shall be considered to have been executed two (2) days after the date on which it is mailed, duly executed on behalf of the Company, by certified mail to the prospective distributor's last known address." The General Distributor Agreement used during the same time period contained similar language in paragraph 16(c).

In the third revised marketing program the self-executing clauses in both the Direct and General Distributor agreements were changed to provide that the date of execution would be three days after the mailing date.

three-day cancellation right defendant agreed to accord all participants. The fatal defect was not, as the Government maintains, that the contract might have been delayed in the mail, thereby reducing the time in which the cancellation right could be exercised to something less than three days. Rather, a self-executing contract of the type used in the second and third revised marketing programs rendered a prospective participant absolutely bound by the terms of the contract, with no right to cancel, even if he merely chose to ponder his decision and did nothing to execute the contract during the five (later six) day period following the date on which the contract was mailed to him.

This is clearly not the situation envisioned by the Consent Order. Paragraph 6(a) provided that the three-day cancellation period would run "from the date of execution of such contract." If that language is to be given its natural and common sense meaning, it contemplates that any participant would have an absolute right to cancel the contract for three days following his decision to participate in Bestline's marketing program, that is, from a layman's perspective, his decision to sign on the dotted line. Indeed, the Bestline Business Opportunity Booklet promised no less: it assured all prospective participants that they would have the right to cancel the contract within three days of the date the contract was *signed*, and this is the precise language contained in the Direct Distributor agreement used during the first revised marketing program.[16] If, as defendant maintains, Bestline was genuinely concerned that the company not accept a prospective Direct Distributor's offer, cash his check, commit itself by paying the commission to the sponsoring General Distributor, and ship the product to the new participant, only to discover at some remote date that the prospective Direct had only then signed the contract and within three days had exercised his cancellation right, Bestline could easily have refrained from taking any of those actions until the contract was finally binding, as any prudent businessman would have done. And, if Bestline was concerned that a prospective Direct "could sit on top of the Direct Distributor Agreement without executing it," Defendant Bailey's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, at 66, the contract could easily have provided that the failure to execute the contract within a given period of time would constitute a revocation of the offer. But instead, defendant approved a self-executing provision. By including such a provision in all contracts used after February, 1972, defendant attempted—perhaps successfully in some cases—utterly to frustrate the exercise of a prospective participant's three-day cancella-

[16] Paragraph 14(c) of that contract provided as follows:

"This contract may be cancelled for any reason, within three (3) working days from the date such contract was signed, upon written notice to Bestline Products, Inc., P.O.Box 6416, San Jose, California 95150."

tion right. This the Consent Order did not permit, nor can the Court condone.

The Court holds that defendant violated paragraph 6(a) of the Consent Order by failing to inform orally all participants of their three-day cancellation right and by failing to provide for that right in all written contracts of participation.

E. *Paragraph 12(a)*

Paragraph 12(a) of the Consent Order prohibited

> [780] Failing to disclose, orally and in writing, the terms of this order to cease and desist to all present and future distributors, salesmen or other persons engaged in the sale of respondent's products, services, or merchandising programs, and securing from each such distributor, salesmen [*sic*] or other person a signed statement evidencing receipt of said disclosure.

It is the Government's theory that because Bestline's post-Consent Order marketing programs violated other paragraphs of the Order, "it is axiomatic that defendant violated Paragraph 12(a) of the Order." Plaintiff's Motion for Partial Summary Judgment Against Defendant Bailey, at 47. Specifically, the Government maintains that no opportunity meeting script or Bestline Business Opportunity Booklet accurately informed citizens of the conduct prohibited by paragraphs 1, 3, 4, 5, and 6(a) of the Consent Order and, therefore, that defendant has violated paragraph 12(a) as well.[17]

[20] The Court does not share the Government's belief that a violation of paragraph 12(a) would follow axiomatically from violations of other pargraphs of the Consent Order. It could have been true that while Bestline's revised marketing programs did not themselves comply with the terms of the Order, all participants were nevertheless accurately and fully apprised of those terms. The Court grants that such a situation would be unusual, but because it is not foreclosed by the circumstances of this case, the Court refuses to hold as a matter of law that a violation of another portion of the Consent Order necessarily implies a violation of paragraph 12(a).

[21] Turning, then, to the evidentiary materials upon which the Government relies—the opportunity meeting scripts and the Bestline Business Opportunity Booklets—the Court does not feel that the oral disclosure issue can be resolved solely by reference to those materials, for the possibility remains that speakers at the opportunity meetings deviated from the scripts and spoke extemporaneously, or informed participants of the terms of the Order on other occasions. The question

[17] The Government does not argue, nor could it in the face of the language of paragraph 12(a), that defendant was obligated to disclose the *existence* of the Consent Order. Paragraph 12(a) requires only the disclosure of the *terms* of the Order.

of what was told to participants is essentially one of fact, and although the trier of fact would undoubtedly accord substantial weight to the contents of the opportunity meeting scripts, they are an insufficient basis in themselves upon which to found, as a matter of law, a violation of the oral disclosure requirement of paragraph 12(a).

[22,23] As for the written disclosure requirement, defendant relies entirely upon the contents of pages 14 and 15 of the Bestline Business Opportunity Booklets. All Direct and General Distributors acknowledged in writing, in the General and Direct Distributor Agreements, that they had received, read and understood a copy of that Booklet. The record is silent, however, on whether or not Local Distributors were given a copy of the Booklet; it is similarly silent on whether or not participants who were already Direct or General Distributors at the time the Consent Order became effective—and therefore would not have had occasion to contract anew with Bestline—received that Booklet or otherwise acknowledged receipt of a written copy of the terms of the Consent Order. Assuming, though, that all participants received and acknowledged receipt of a copy of the Business Opportunity Booklet, the question remains whether the information set forth therein adequately complies with the requirement of paragraph 12(a) that the terms of the Consent Order be disclosed.

The Court believes that this question must be answered in the negative. Defendant argues that the statement of "Policies and Procedures Affecting Distributors" on pages 14 and 15 of the Booklet "adequately paraphrases" the terms of the Consent Order. Defendant Bailey's Memorandum in Opposition to Plaintiff's Motion for Partial [781] Summary Judgment, at 70. Defendant, of course, was not obligated by paragraph 12(a) to quote the terms of the Consent Order verbatim in the written disclosure to participants. However, by paraphrasing those terms he assumed the risk that the language employed would fail, as a matter of law, adequately to inform participants of those terms. The Court concludes that this occurred. For example, on page 14 of the Bestline Business Opportunity Booklet used during the second revised marketing program, participants were told that:

> Under certain conditions, and in accordance with the provisions of this agreement, a distributor shall have the option to, at any time within three months after the date of receipt of order, return the unused portion, undamaged, of his initial inventory to Bestline Products, Inc., for refund. Further details concerning refunds may be obtained from Bestline's Corporate Offices in San Jose, California.

Presumably, this passage was intended to paraphrase the 90-day refund requirement of paragraph 4 of the Consent Order. Omitted, however, is any reference to the fact that once inventory costs reached

$500 or more within the 90-day period, Bestline's obligation under the Consent Order to repurchase unused inventory immediately ceased upon a participant's subsequent purchase of product. In view of the split purchase procedure for Candidate Direct Distributors adopted under the second revised marketing program, discussed in footnote 13, *supra*, the limited disclosure on page 14 of the terms of the 90-day refund provision is inadequate. Other instances of inadequate disclosure could be mentioned, as, for example, the omission from the Bestline Business Opportunity Booklet utilized prior to February, 1972, of any explicit mention that no consideration would be paid for the recruitment of others into the Bestline marketing program. In sum, the careful, guarded language contained on pages 14 and 15 of the Booklet, even if distributed to all participants in the program, fails to satisfy the written disclosure requirement of paragraph 12(a). Accordingly, the Court holds that defendant did not comply with that portion of the Consent Order.

IV. *Conclusion*

To recapitulate, the Court holds that:

1. Defendant violated paragraph 1 of the Consent Order by operating a marketing program from November 3, 1971, to July 31, 1973, wherein the financial gains to participants were dependent upon recruitment of other participants;

2. Defendant violated paragraph 3 of the Consent Order by operating a marketing program from November 3, 1971, to July 31, 1973, wherein consideration was paid to participants who did not perform a bona fide and essential supervisory, distributive, selling or soliciting function in the sale and delivery of product to the ultimate consumer;

3. Defendant violated paragraph 4 of the Consent Order by requiring Direct Distributor participants to pay monthly co-op dues of $25 during the period November 3, 1971, to February 29, 1972;

4. Defendant violated paragraph 4 of the Consent Order from November 3, 1971, to July 31, 1973, by requiring Direct Distributors who wished to ascend to General Distributor to make payments to the General Training Fund;

5. Defendant violated paragraph 4 of the Consent Order from November 3, 1971, to February 29, 1972, by allocating $441 of the sum paid by a pre-purchase Direct Distributor for administrative and processing costs;

6. Defendant violated paragraph 6(a) of the Consent Order from November 3, 1971, to July 31, 1973, in that all participants were not orally informed that all contracts of participation could be cancelled within three working days from the date the contract was executed;

7. Defendant violated paragraph 6(a) of the Consent Order from March 1, 1972, to July 31, 1973, in that all contracts of participation did not provide that the contract could be cancelled within three working [782] days from the date the contract was executed; and that

8. Defendant violated paragraph 12(a) of the Consent Order during the period November 3, 1971, to July 31, 1973, by failing to disclose in writing to all participants the terms of the Consent Order.

[24] It may well be that none of these violations were willful or deliberate, but that defendant attempted in good faith to comply with all of the terms of the Consent Order and simply misunderstood both the scope of the Order and his obligations thereunder. The Court, of course, will not prejudge those issues; however, they concern matters which are relevant only in the determination of the severity of the penalty to be imposed. They cannot excuse defendant's extensive and continued non-compliance with the Commission's Order. Accordingly,

IT IS HEREBY ORDERED that defendant's motion for partial summary judgment is denied.

IT IS HEREBY FURTHER ORDERED that the Government's motion for partial summary judgment with respect to paragraph 5 of the Consent Order is denied.

IT IS HEREBY FURTHER ORDERED that the Government's motion for partial summary judgment with respect to paragraphs 1, 3, 4, 6(a) and 12(a) of the Consent Order is granted as hereinabove set forth.

FEDERAL TRADE COMMISSION v. RALPH H. MILLER, BILL R. PRIVITT, and MORGAN DRIVE AWAY, INC.*

Civil No. S 75–106. F.T.C. File No. 724 3125.

(United States District Court, Northern District of Indiana, South Bend Division, April 14, 1976)

On petition for subpoena enforcement, court held that despite F.T.C. Act exemption of common carriers subject to Interstate Commerce Act, F.T.C. was entitled to subpoena enforcement in connection with preliminary investigation, where necessary documentary evidence of possible violations of the Act can only be obtained by subpoena; jurisdictional issue, raised as defense, was premature at preliminary investigation stage; and administrative agency has Congressional authority to determine jurisdiction in preparatory search for violations.

Petition granted.

Richard L. Kieser, Asst. U.S. Atty., South Bend, Ind., for plaintiff.
James B. Buda, Elkhart, Ind., for defendants.
Before GRANT, *District Judge*.

MEMORANDUM

The Federal Trade Commission has petitioned this court, pursuant to Section 9 of the Federal Trade Commission Act (15 U.S.C. § 49) and Section 16 of said Act (15 U.S.C. § 56) as amended by P.L. 93–637, §§ 203–204 (Jan. 4, 1975), for an order requiring Respondent Morgan Drive Away, Inc., and its officers to testify and produce books, papers, documents, and other materials in accordance with its subpoena *duces tecum* and subpoena *ad testificandum* issued on 4 February 1974, in connection with an investigation to determine whether respondent is engaged in unfair or deceptive acts or practices in violation of § 5 of the Federal Trade Commission Act by misleading advertising or misrepresentations involving the solicitation of persons to become owner-operators in the nationwide mobile home transporting industry. This action is prompted by respondents' refusal to appear in response to the subpoenas after their motion to quash or limit the subpoenas was denied by petitioner.

The FTC maintains initially that its subpoena should be enforced since the investigation is within its broad statutory authority to compel testimony and the production of documentary evidence relating to any matter under investigation. This proposition, it is argued, has received uniform support in the courts, unless the evidence sought is clearly irrelevant and immaterial. *F.T.C.* v. *Standard American, Inc.*, 306 F. 2d 231, 234–235 (3rd Cir. 1962). Second, the FTC argues that the

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶60,926 at 69,033.

question of whether respondents are covered under §§ 5 and 6 of the FTC Act (15 U.S.C. §§ 45, 46) is not an appropriate question for this court to determine. This question, it is asserted, is one that is properly resolved in a proceeding before the Commission, not the district court, as it is independent of, and has nothing to do with, this court's ruling on the FTC's investigative powers. Further, the FTC asserts that its investigation of the advertising practices of respondent is not related to its function as a carrier. Rather, it is contended that the FTC's authority to investigate is clearly limited to matters peripheral to Morgan's function as a carrier. Accordingly, the FTC says that jurisdiction of the matter herein (advertising) is not properly within the regulatory activity of the ICC, as respondent would have the court believe. In this regard, the FTC maintains that its investigation will in no way interfere with the effective regulatory activity of the ICC. Finally, in support of its position, the FTC asserts that respondent is unable to show that the subpoena *duces tecum* issued in this case is either oppressive or burdensome. It is submitted, therefore, for the reasons stated above, that the FTC is entitled to the relief sought herein by an order of this court.

In their answer, respondents say that they have refused to respond to the FTC subpoenas in this matter because the FTC lacks statutory authority to investigate and regulate common carriers; that the subpoenas herein are oppressive, burdensome and irrelevant; and that the instant subpoenas are without the scope of the FTC's lawful authority.

Respondents contend, first of all, that the FTC has no authority to investigate the alleged violations herein because common carriers are subject to the jurisdiction of the ICC under the Interstate Commerce Act. Accordingly, it is asserted that the purported investigation herein is both unauthorized and illegal. In this regard, respondents argue that it is clear under the Federal Trade Commission Act that common carriers are exempted, and instead are subject to "the Act which regulates commerce", i.e., the Interstate Commerce Act. 15 U.S.C. §§ 45(a)(6) and 46(a). It is asserted that no court has ever held that the FTC has authority to investigate or regulate common carriers. Since Morgan is a common carrier "subject to the Act to regulate commerce," and all its business operations have been as a common carrier, it is argued that the FTC lacks authority to proceed here. This is evident, argue respondents, in light of the clear intent of Congress to vest the regulation of common carriers in the ICC. Further, respondents maintain that the Interstate Commerce Act vests broad powers in the ICC, including the regulation of trade practices of common carriers. The ICC has in fact, say respondents, exercised its authority with reference to "unfair or destructive and competitive practices,"

including the advertising practices of common carriers. Finally, respondents contend that the question of whether this investigation is within the FTC's authority (the coverage issue) is a proper question for this court to determine at this time. For the above reasons, therefore, respondents argue that this court should deny the FTC's petition for an order enforcing the subpoenas in question.

After oral argument on the issues which pend herein, respondents filed a supplemental memorandum in which it is argued that certain amendments to the Code of Federal Regulations have been proposed wherein the Interstate Commerce Commission has indicated its willingness to assume jurisdiction over the advertising practices of common carriers. 49 C.F.R. 1056. The FTC's response, however, contends that the proposed amendment merely indicates that the ICC's activities regarding the advertising practices of common carriers is only ancillary; and that respondents still have failed to demonstrate that the practices which the FTC seeks to investigate here are, in fact, regulated by the ICC. Petitioner again emphasizes its position that the question of coverage is not a defense to the enforcement of the subpoenas herein and should not be litigated in this subpoena enforcement action. Respondents thereupon realleged their proposition that this court should not be prevented from acting in this proceeding where the FTC seeks to engage in an unlawful and illegal investigation, and where the Federal Trade Commission Act is explicit in exempting common carriers subject to the Interstate Commerce Act.

The court has examined the record in this cause with the utmost diligence and has grappled with the difficult questions herein presented. As a result of this court's exhaustive examination and analysis of the positions as expressed by the parties in oral argument and written memoranda, as well as the applicable law, the court concludes, for the following reasons, that the FTC's subpoena *duces tecum* and subpoena *ad testificandum*, which would require respondents to testify and produce certain documentary evidence, ought to be enforced.

Initially, the court would state that throughout these entire proceedings, it has been deeply concerned with the possibility —if the FTC subpoenas herein were enforced— that respondents would be the object of not one, but two administrative investigations promulgated by two separate administrative agencies. This result which, in the opinion of this court, was within the realm of possibilities, caused the court serious difficulty in arriving at a viable solution in this case. The court found itself in a position wherein it was asked to impinge upon the administrative sphere by making a determination as to which agency, the FTC or ICC, was the proper overseer of respondents' activities in regard to advertising. On the one hand, the court was

confronted with the proposition advanced by respondents that the Federal Trade Commission Act is clear that common carriers are exempt from its strictures in favor of coverage under the Interstate Commerce Act. On the other hand, the court had to consider its position in regard to the administrative process and the command that courts respect and not interfere with that process except under the most limited and exceptional circumstances. The court, therefore, admittedly found itself in a most precarious position.

Nevertheless, notwithstanding the above, this court is confident in the ruling which it propounds herein and finds that the position advanced by the FTC is the more persuasive one. In this regard, the court is convinced, based on a thorough review of the applicable law, that this court is not the forum in which to assert the issue of jurisdiction as a defense to a subpoena enforcement petition. The law is clear on the point that the subpoena enforcement issue is a question separate and distinct from the coverage question. Thus, the question of whether respondents are covered by the Federal Trade Commission Act or whether they come under the jurisdiction of the Interstate Commerce Commission in regard to advertising practices cannot and should not be litigated in this subpoena enforcement action. *Securities and Exchange Commission* v. *Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1053 (2d Cir. 1973). As the First Circuit Court of Appeals has stated in this regard:

> * * * [A]ppellants may not litigate questions having to do with the application and coverage of the federal securities laws before responding to subpoenas * * * [W]hether or not certain activities are subject to SEC regulation is not to be decided in a subpoena enforcement action. Rather the Commission "must be free without undue interference or delay to conduct an investigation which will adequately develop a factual basis for a determination as to whether particular activities come within the Commission's regulatory authority."

Securities and Exchange Commission v. *Howatt*, 525 F. 2d 226, 229-230 (1st. Cir. 1975), citing *Brigadoon, supra*. This court is of the view that the same principle is applicable to the case at bar.

Furthermore, this Circuit has recently stated, in the case of *Federal Trade Commission* v. *Feldman*, No. 75-1583 (7th Cir. Feb. 24, 1976), that:

> The courts have been reluctant to interfere in the investigative stage of the administrative process. In *Okla. Press Pub. Co.* v. *Walling*, 327 U. S. 186, 214 (1946), the Supreme Court stated:
>
> > * * * Congress has authorized [the agency], rather than the district courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations; * * * to exercise [the agency's] subpoena power for securing evidence upon that question * * * and, in case of refusal to obey [the agency's] subpoena, to have the aid of the district court in enforcing it * * *.

In reference to the *Oklahoma Press* decision, the court, in *FTC* v. *Gibson*, 460 F. 2d 605, 608 (5th Cir. 1972), stated:

> The rationale of the Oklahoma Press rule is that it allows enforcement of subpoenas where the evidence necessary to establish the interstate nature of the commerce involved is in the possession of the suspected violator and can be secured only by * * * a subpoena. Under this rule appellants may not litigate the jurisdictional issue as a defense in a subpoena enforcement proceeding.

Slip Op. at 6-7.

It is clear from the above, therefore, that this court should not hinder the FTC's efforts to develop the necessary factual background upon which to determine whether a violation exists. This goal is more efficiently accomplished if the FTC is allowed to conduct its investigation without any interruption that this court would bring about by allowing respondents to seek aid from this court at such an early stage. *McKart* v. *United States*, 395 U. S. 185, 193-194 (1965). Although the court recognizes the fact, as respondents have demonstrated, that there do appear to be certain situations where the ICC is inclined to assume jurisdiction over and control the advertising practices of common carriers, 49 C. F. R. 1056; *Transportes Azteca Extension, Eastern States*, 117 M. C. C. 645 (1972), the court in this case is compelled to adopt a hands-off policy and at least refrain from impeding the FTC in conducting its preliminary inquiry into whether or not the particular activities of respondents come within the scope of its regulatory authority.

For the foregoing reasons, therefore, the Federal Trade Commission's petition for the enforcement of its subpoenas must be granted.

WESTINGHOUSE ELECTRIC CORP. v. FEDERAL TRADE COMMISSION, et al.*

Civ. A. No. C–1–75–418. F.T.C. File No. 99–266.

(United States District Court, Southern District of Ohio, Western Division, April 15, 1976)

In action seeking declaratory and injunctive relief against F.T.C., court held that despite its jurisdictional authority to entertain preenforcement suit, venue was inappropriate, and rather than dismissing the case, justice would best be served by transferring it to the court entertaining the enforcement proceeding initiated by the F.T.C.

Smith H. Tyler, Jr., Cincinnati, Ohio, for plaintiff.

Robert Lewis and *Jerry Kaminski*, Washington, D.C., for defendants.

Before PORTER, *District Judge*.

OPINION

On November 18, 1975 Westinghouse filed this suit, seeking to have the order requiring it to file Form EEM (Complaint doc. 1, Exhibit B & D) declared null and void and to have an injunction issued against the Federal Trade Commission (FTC) from enforcing it against them. On January 6, 1976, the Commission brought suit in United States District Court for the District of Columbia, seeking an order commanding plaintiff and three other companies who have not filed Form EEM to comply with the Commission's orders. On January 22, 1976, the FTC filed in this Court motions to dismiss, without prejudice, or in the alternative, to transfer this action to the District of Columbia, or to stay all proceedings pending completion of the enforcement action. On January 27, 1976 defendant Comptroller General filed a motion to dismiss with this Court. On January 14, 1976 Westinghouse sought an injunction in this Court seeking to stay the FTC from proceeding in the District of Columbia enforcement proceeding.

The main issue in this litigation is the legality of the Form "EEM" which is a part of a study by the FTC to gather information about the manufacturing and sale of large electrical equipment which is produced by some forty-four major electrical manufacturers including plaintiff Westinghouse. The FTC's purpose for obtaining this data is to use it to empirically test the effectiveness of so-called "conduct remedies," *e.g.*, injunctions, imprisonment, fines and treble damages, on the companies' behavior before and after certain antitrust actions

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶60,871 at 68,815 (1976–1 Trade Cases).

conducted in the 1960's against several of the large electrical equipment manufacturers.

On June 27, 1975 the FTC pursuant to procedures contained in 16 C. F. R. § 2.12 approved and adopted a final Form EEM (Complaint, Exhibits B & D) and ordered Westinghouse and forty-one other corporations to complete and file said form.

The final Form EEM, at issue here, was submitted on October 17, 1974 to the Government Accounting Office pursuant to the Federal Reports Act, 44 U. S. C. §§ 3501— 3512 for the mandated approval of the Comptroller General. Under § 3512 the Comptroller General must determine whether any governmental agency form (1) avoids duplication of effort in gathering information which might be already possessed by other independent regulatory agencies and (2) minimizes the compliance burden on businesses or other persons. This screening is important. However, this review by the Comptroller General is not the final determinant of forms used by the agency, for 44 U. S. C. § 3612(d) states that the agency shall make the final determination. We find that because the statute characterizes the Comptroller General's response to the agency as "advice," his decision is one committed to his discretion.

On July 16, 1975, Westinghouse filed a motion to quash this order with the Commission. The bases for the motion were that (1) the order was issued in excess of the Commission's authority; (2) the order violated 13 U. S. C. § 9 and 15 U.S.C. § 46(f) and (3) the order was unduly burdensome. The Commission denied plaintiff's motion to quash on October 23, 1975 (Complaint, Exhibit E) and stated that, if plaintiff complied with the report, it could submit a statement as to the information for which it requests confidential treatment and the reasons therefor. The time for compliance was extended for thirty days from the date the letter was sent or November 22, 1975. The present suit was filed on November 18, 1975 and the pending motions are outlined in the first paragraph of this opinion.

The Commission meanwhile has obtained completed forms from 27 of the companies served with Form EEM. Eleven companies were dropped because they did not manufacture equipment related to the survey. Thus only four companies are in default of the Commission's orders. Each of the four companies has brought a preenforcement action against the Commission. Westinghouse, of course, here. Emerson Electric Corporation has filed in the Eastern District of Missouri and we are not aware of the developments in that case. General Electric and Ingersoll-Rand have filed suit in the Northern District of New York. All of the motions filed in the instant suit were also filed in the New York litigation. On March 23, 1976 Judge Foley ruled on the several motions and concluded that the Court has

jurisdiction, and thus, denied the FTC's motion to dismiss and to stay. He granted the FTC's motions to transfer the General Electric case pursuant to 28 U. S. C. § 1404(a) and the Ingersoll-Rand case pursuant to 28 U.S.C. § 1406.

We find that this Court has jurisdiction to entertain preenforcement suits for declaratory and injunctive relief against the FTC. *A. O. Smith Corp.* v. *F. T. C.*, 1976–1 TRADE CASES ¶ 60,730 (3d Cir. Feb. 11, 1976). The jurisdictional statutes are 28 U. S. C. §§ 1331 and 1337. Plaintiff also claims that the Declaratory Judgment Act, 28 U. S. C. §§ 2201 and 2202, is jurisdictional. We note that while applicable, that Act is not jurisdictional but provides an additional remedy where jurisdiction already exists.

The orders in controversy were issued pursuant to Section 6(b) of the Federal Trade Commission Act, 15 U. S. C. § 46(b), and thus, were not self-enforcing. The Commission, to enforce these orders, must use the procedures set forth in Sections 9 and 10 of the Act, 15 U. S. C. §§ 40, 50. On January 6, 1976 the FTC petitioned the District Court in the District of Columbia pursuant to Section 9 for an order in the nature of mandamus to compel the filing of a report thus instituting the enforcement procedure. Section 10 provides for the issuance of notices of default, and for the accrual of civil penalties of $100 for each day of default after the thirtieth day following receipt of notice.

The *Abbott Laboratories* trilogy supplies the major principles applicable today in deciding whether federal courts have jurisdiction to review administrative actions. The teaching of *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967) is that a person aggrieved by final agency action may come to federal court for judicial review so long as "(a) no statute precludes such relief or (b) the action is not one committed by law to agency discretion." 387 U. S. at 140. "Only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott*, at 141; *Dunlop* v. *Bachowski*, 421 U. S. 560 (1975). We find no clear and convincing evidence of a congressional intent to bar judicial review of final FTC orders under § 6(b) in the Federal Trade Commission Act. *A. O. Smith, supra.* This Court finds that it has jurisdiction to entertain Westinghouse's suit against the Commission.

Thus, concluding the FTC's motion to dismiss for lack of jurisdiction is not well-taken, we turn to other motions presently before this Court. Both the FTC and the Comptroller General have moved to dismiss without prejudice under the Federal Rules of Civil Procedure for want of equity in this action and the existence of an adequate remedy at law elsewhere—namely, the enforcement proceeding now pending in the United States District Court for the District of Columbia. Alternatively defendants move to transfer this action to the District of Columbia

Court pursuant to 28 U. S. C. § 1404(a) or 1406(a) or to stay this action pending the completion of the enforcement proceeding.

After considering the various alternatives open to it, this Court is of the opinion that transfer pursuant to 28 U. S. C. § 1406(a) to the District Court for the District of Columbia where the enforcement proceeding has already been brought is the proper course of action for us to take.[1] We find that venue is improperly laid in this Court under 28 U. S. C. § 1391(e)(4).[2] We recognize that there is a split of authority among the circuits on the question of whether the definition of "residence" in 28 U. S. C. § 1391(c)[3] is applicable to a corporate plaintiff in an action against the government, where venue is based on 28 U. S. C. § 1391(e)(4). We find in our reading of the cases that the provisions of § 1391(c), insofar as the definition of residence therein is concerned, are applicable to corporate plaintiffs in § 1391(e)(4) cases. *DC Electronics* v. *Schlesinger*, 368 F. Supp. 1029 (N. D. Ill. 1974); *Manchester Modes, Inc.* v. *Schuman*, 426 F. 2d 629 (2d Cir. 1970) (*per* Friendly, J.); *Upjohn Co.* v. *Finch*, 303 F. Supp. 241 (W. D. Mich. 1969).

We conclude that the persuasive weight of authority is that § 1391(c) does not apply to corporations as plaintiffs and that the definition of residence for such plaintiff remains the State of its incorporation or of its principal place of business (which in the instant case is Pennsylvania). *Manchester Modes, supra; Carter-Beveridge Drilling Co.* v. *Hughes*, 323 F. 2d 417 (5th Cir. 1963); *Robert E. Lee & Co.* v. *Veatch*, 301 F. 2d 434 (4th Cir. 1961), *cert. denied*, 371 U. S. 813 (1962); *Dixie Portland Flour Mills, Inc.* v. *Dixie Feed & Seed Co.* 272 F. Supp. 826, 828-29 (W. D. Tenn. 1965) aff'd on other grounds, 382 F. 2d 830 (6th Cir. 1967); 1 Moore, *Federal Practice* ¶0.142 [5-1-3], at 1414-17 (2d ed. 1975); Hart & Weschler, *The Federal Courts and The Federal System*, (2d Ed. 1973), p. 1123. Further we find that the statutory language mandates this result. First, had Congress intended § 1391(c) to apply to plaintiff corporations it could easily have said "A corporation may sue or be sued . . ." instead of saying only "A corporation may be sued . . .". Second, the latter clause ". . . and such judicial district shall be regarded as the residence of *such* corporation for venue purposes" (emphasis supplied)— further indicates that the intent was not to

[1] 28 U. S. C. § 1406(a) provides:

"The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

[2] 28 U. S. C. § 1391(e) provides:

"A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or as an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

[3] 28 U.S.C. § 1391(c) provides:

"A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

include corporate plaintiffs. Textually, the use of "such corporation" must mean a defendant corporation since that is what the first clause is talking about.

Plaintiff refers us to the authority relating to § 1391(e)(4) in this circuit—namely *Upjohn* v. *Finch*, 303 F. Supp. 241 (W. D. Mich. 1969) and *Pace* v. *Dept. of the Army*, 344 F. Supp. 787 (W. D. Tenn. 1971). In the *Upjohn* case it was acknowledged that the provisions of § 1391(c), insofar as the definition of residence is concerned, are applicable to corporate plaintiffs in § 1391(e)(4) cases. In explaining the position that § 1391(c) applies to corporate plaintiffs as well as defendants, the Court in *Upjohn, supra*, refers to *Southern Paperboard Corp.* v. *United States*, 127 F. Supp. 649 (S. D. N. Y. 1955). We note that the two most recent cases from the Southern District of New York prior to the court's decision in *Upjohn, supra*, held that § 1391(c) did not apply to corporate plaintiffs. *Control Data Corp.* v. *Carolina Power & Light Co.*, 274 F. Supp. 336 (S. D. N. Y. 1967); *Lumbermens Mutual Casualty Company* v. *South Portland Engineering Company, et al.*, 252 F. Supp. 149 (S. D. N. Y. 1966). We have also examined the *Pace, supra*, case cited by plaintiff and find that the Court there simply stated that "venue appears to be appropriate in this district." The Court follows this statement with a citation to *Upjohn, supra*, and does not discuss the issue at all.

Plaintiff refers us to the legislative history of § 1391(e)(4) to support its position that the definition of "resides" includes any State in which the plaintiff does business. After examining the legislative history, we find that the purpose of the statute was to:

> • • • make it possible to bring actions against Government officials and agencies in U. S. district courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U. S. District Court for the District of Columbia. 1962 U. S. Code Cong. and Adm. News 2785.

We note that there are four places where venue would be proper in a suit against the government listed in § 1391(e) and that the enforcement proceeding. We also note that plaintiff has not attempted to make the Comptroller General a party in the Washington enforcement proceeding. At any rate, if he is permitted to be made a party, the Court can determine whether he did violate the law in exercising his function regarding these forms at issue and can refuse to require Westinghouse to file the forms. Thus, it matters not which court this determination takes place in and we conclude that the Washington enforcement proceeding is not inadequate because the Comptroller General is not at present a party there.

Another concern of plaintiff involves the necessity for limiting the use of this data— *i.e.*, the confidentiality problem. We find, however,

that the enforcement Court can enter a protective order limiting the use of this data the same as this Court can. *SEC* v. *Lockheed Aircraft Corp.*, 404 F. Supp. 651 (D. D. C. 1975). Thus, the enforcement proceeding is not inadequate for that reason.

The major reason Westinghouse puts forth in its claim that the enforcement proceeding is inadequate is that discovery will be more limited there than in the instant suit. With this contention, we do not agree. First we note that the Commission's position with regard is discovery (*i.e.*, that is to be limited to materials submitted to the Commission in connection with the motions to quash (doc. 12 p. 9) with which Westinghouse disagrees) will be the same whether the forum is the enforcement proceeding or this Court. The contention that the enforcement proceeding is inadequate because of its summary nature was to this Court's satisfaction laid to rest in *A. O. Smith*, *supra*, at 68, 144–45 where the court stated:

> We may begin by conceding that the scope of discovery in a summary enforcement proceeding might be different from that in plenary suit, just as it might be different if the suit were heard in district A instead of district B or before Judge X instead of Judge Y. However, we could hardly elevate such a speculative and fortuitous procedural variance to the status of irreparable harm without seriously—perhaps irreparably undermining the salutary limitation that concept places on the exercise of the injunctive power.

Thus we conclude that the pending enforcement action provides plaintiff with an adequate judicial remedy and it is in the interest of justice to transfer this suit. The motions of defendants to dismiss or in the alternative to transfer under 18 U. S. C. § 1404(a) or to stay this action are hereby denied as the motion to transfer pursuant to 18 U. S. C. § 1406(a) is granted. Plaintiff's request for injunctive relief against the Commission's proceeding against it in the enforcement proceeding is moot due to the above disposition of this case.

We recognize that under § 1406(a) on plaintiff's motion, transfer to the Eastern District of Pennsylvania is an alternative open to the Court, since plaintiff's principal-place of business is in that District and it is, therefore, a District in which the action could have been brought. From what we have said, it is clear that on the record before us we have concluded it would be in the interests of justice to transfer the case to the District Court for the District of Columbia. Hence, an order is being entered simultaneously with this opinion directing such transfer. However, this is without prejudice to the right of the plaintiff to move for reconsideration of the order and to request transfer to the Eastern District of Pennsylvania instead of the District Court for the District of Columbia.

A.O. SMITH et al. v. FEDERAL TRADE COMMISSION et al.*

Civ. A. Nos. 75-15, 75-45 to 75-50, 75-56, 75-142, 75-415, 75-415, 76-17 to 76-26, 76-36, 76-39, 76-56 and 76-60.

F.T.C. File No. 99-199.

(United States District Court, District of Delaware, April 30, 1976)

1. FOR ISSUANCE OF PRELIMINARY INJUNCTION, MOVANT MUST SHOW A PROBABILITY OF SUCCESS ON THE MERITS; LACK OF SUBSTANTIAL HARM TO THIRD PARTIES OR THE PUBLIC INTEREST; AND THAT IRREPARABLE INJURY WOULD FOLLOW ANY DISTURBANCE OF THE STATUS QUO PENDENTE LITE.

   Showings that must be made for issuance of a preliminary injunction are: (1) that the moving party has a reasonable possibility of success on the merits, (2) that it will suffer irreparable injury pendente lite if the status quo is not maintained, (3) that the grant of a preliminary injunction will not substantially harm third parties interested in the outcome of the proceedings, and (4) that the public interest will not be adversely affected.

2. DILEMMA OF COMPLIANCE ISSUE, PROPERLY EXAMINED BY COURT, FAILED TO DEMONSTRATE THE NECESSARY LEVEL OF IRREPARABILITY TO WARRANT PRELIMINARY INJUNCTION, SINCE BURDEN OF COMPLIANCE, AS A NORMAL BUSINESS EXPENSE RESULTING IN ONLY A LOSS OF PROFIT, DOES NOT CONSTITUTE AN IRREPARABLE INJURY.

   General burden of complying with Federal Trade Commission's line of business program and its corporate pattern reports program did not rise to level of irreparable injury warranting preliminary injunction; while dilemma of compliance was properly considered with respect to District Court's exercise of preenforcement review it proved nothing regarding irreparability; burden of compliance, being an ordinary unrecoverable business expense resulting in a loss of profits, cannot, without a demonstration of some peculiar resulting harm, be considered an irreparable injury.

3. BECAUSE OF THE LB PROGRAM'S CONTINUING NATURE, THE BUSINESS EXPENSE ASPECT OF COMPLIANCE COSTS WAS NOT ALTERED; AND CONSIDERING THE MAGNITUDE OF PLAINTIFF CORPORATIONS, THEIR CONTENTION THE ADEQUATE PLANNING WITH REGARD TO UTILIZATION OF CORPORATE RESOURCES WAS SO HAMPERED BY BURDEN OF COMPLIANCE AS TO CONSTITUTE IRREPARABLE INJURY DID NOT WARRANT ISSUANCE OF PRELIMINARY INJUNCTION.

   Contention that additional burden of annual compliance with Federal Trade Commission's line of business program, when compounded by periodic changes, irreparably injured plaintiffs by preventing adequate planning with regard to utilization of their corporate resources did not warrant preliminary injunction

* Reported in 417 F.Supp. 1068 (1976).

restraining operation of the program, absent any credible evidence that corporations of plaintiffs' magnitude were being so hampered in their future planning as to sustain any significant injury; in any event, continuing nature of the program did not change the business expense character of the costs of compliance.

4. ALLEGED "DANGER" FROM PUBLICATION OF PURPORTEDLY MISLEADING 1972 CORPORATE DATA WAS SUFFICIENTLY REMOTE AS TO REMOVE THE NECESSITY FOR PENDENTE LITE RESTRAINT, WHERE F.T.C. HAD BOUND ITSELF NOT TO PUBLISH THE DATA BEFORE JANUARY 1, 1978.

Since Federal Trade Commission bound itself not to publish before January 1, 1978 any data obtained pursuant to corporate pattern reports concerning 1972 value of shipments from domestic manufacturing establishments, etc., remoteness of the alleged "danger" i.e., publication of allegedly misleading data, totally removed the need for pendente lite restraint since there was neither any immediacy or imminence of the alleged harm.

5. SINCE ACCURACY OF LB DATA COULD BE CHALLENGED IN ANTITRUST SUITS, ALLEGED INJURY BY POSSIBLE INDUSTRY-WIDE ENFORCEMENT ACTIONS AND UNDUE COMPETITION DID NOT REACH THE REQUIRED LEVEL OF IRREPARABLE HARM WARRANTING PRELIMINARY RELIEF.

Alleged harm from publication of data collected under Federal Trade Commission's line of business program, i.e., industry-wide enforcement actions or unwarranted competition, did not rise to level of irreparable injury warranting preliminary injunction since plaintiffs would be able to challenge accuracy of such data in any antitrust suit based thereon; moreover, mere fact of competition could not be considered irreparable [1069] injury since it was possible that the mythical new competitors might themselves be the entities in the mortar and pestle of supply and demand; furthermore, data would be published only on an industry or product line basis.

6. WHERE A CIVIL PENALTIES STAY COULD BE SOUGHT DURING PENDENCY OF A GOOD FAITH CHALLENGE AS TO THE VALIDITY OF F.T.C. PROGRAMS, POSSIBLE ISSUANCE OF DEFAULT NOTICES, WHICH BY THEMSELVES CARRY NO ADVERSE CONSEQUENCES, DID NOT WARRANT PRELIMINARY INJUNCTION.

By themselves, Federal Trade Commission's default notices carry no adverse consequences; hence, possibility of issuance of such notices did not warrant preliminary injunction restraining operation of either Commission's line of business program or its corporate pattern reports program; in any event, should default notices ever issue plaintiffs would be able to seek a stay of civil penalties during pendency of a good faith challenge to validity of the order.

7. ISSUANCE OF NOTICES OF DEFAULT, AS A PRECONDITION TO COMMENCEMENT OF MANDAMUS ENFORCEMENT PROCEEDINGS, IS NOT REQUIRED.

Federal Trade Commission is not required to issue notices of default as a precondition to commencement of mandamus enforcement proceedings.

8. ABSENT UNUSUAL CIRCUMSTANCES, THE $100 PER DAY CIVIL PENALTY FOR NONCOMPLIANCE DID NOT CONSTITUTE IRREPARABLE INJURY, SINCE IT WAS DE MINIMIS WHEN APPLIED TO CORPORATIONS OF THE MAGNITUDE SERVED WITH CPR ORDERS.

The $100 per day civil penalty for failure to file reports required under Federal Trade Commission's corporate pattern reports program was de minimis as applied

to corporations of the magnitude served with the CPR orders, i.e., the 1,000 largest domestic manufacturing corporations, and, thus, absent unusual circumstances would not be considered as irreparable injury warranting preliminary injunctive relief.

9. PRELIMINARY INJUNCTION WAS UNNECESSARY SINCE VALIDITY CHALLENGE COULD BE RAISED IN AN ENFORCEMENT PROCEEDING.

Challenge to validity of Federal Trade Commission's line of business program and its corporate pattern reports program could be raised in an enforcement proceeding; hence, preliminary injunction restraining operation of the programs was not required on ground that sole issue in an enforcement proceeding is the enforceability of the Commission's orders.

10. PRELIMINARY INJUNCTION WAS UNWARRANTED, SINCE VARIATIONS BETWEEN SCOPE OF DISCOVERY IN ENFORCEMENT PROCEEDINGS AND PREENFORCEMENT CHALLENGE FAILED TO RISE TO REQUIRED LEVEL OF IRREPARABLE INJURY.

Variations between scope of discovery in enforcement proceedings and in a preenforcement challenge did not rise to level of irreparable injury warranting preliminary injunction restraining operation of either Federal Trade Commission's line of business program or its corporate pattern reports program; in any event fact that potential differences were simply inchoate possibilities precluded issuance of injunctive relief since positing a finding of irreparable injury thereon would seriously undermine the irreparability requirement as a restraint on exercise of a court's injunctive powers.

11. ABSENT SHOWING THAT PLAINTIFF COULD NOT PETITION ENFORCING COURT TO JOIN COMPTROLLER GENERAL AS A PARTY, OR COULD NOT FILE SEPARATE ACTION AGAINST HIM AND SEEK TO CONSOLIDATE SUCH ACTION WITH ENFORCEMENT PROCEEDINGS, ALLEGATION THAT HE WOULD NOT BE AMENABLE TO SUIT FAILED TO FURNISH A BASIS FOR IRREPARABLE INJURY FINDING.

Contention that Comptroller General would not be amenable to suit in a proceeding seeking enforcement of orders issued under Federal Trade Commission's line of business program or its corporate pattern reports program furnished no basis for finding of irreparable injury warranting preliminary injunctive relief in preenforcement proceedings absent any showing that plaintiff could not petition the enforcing court to join the Comptroller General as a party or could not file a separate civil action against him in the enforcement forum and seek to thereafter consolidate such action with the enforcement proceedings.

12. F.T.C. ACT'S CRIMINAL PROVISIONS ARE NOT DIRECTED AT CORPORATION.

Criminal provisions of the Federal Trade Commission Act do not apply to corporations.

13. RATHER THAN EXERCISE ITS DISCRETION TO ENGAGE IN PREENFORCEMENT REVIEW OF EITHER OF F.T.C.'S PROGRAMS, DELAWARE COURT CHOSE TO TRANSFER TO THE DISTRICT OF COLUMBIA LB CASES SUBJECT TO FORMAL INSTITUTION OF IMMINENT ENFORCEMENT PROCEEDINGS, AND CPR CASES FOR CONSOLIDATION WITH CURRENTLY PENDING ENFORCEMENT ACTIONS.

District court for the District of Delaware declined to exercise its discretion to engage in preenforcement review of either Federal Trade Commission's line of

business programs or its corporate pattern reports program but, instead, with respect to the CPR cases transferred them to the District of Columbia for consolidation with now pending CPR enforcement actions recently instituted by the Commission and transfer[1070]red the LB cases subject to formal institution of imminently forthcoming enforcement proceedings in such district.

14. COURT IS NOT INQUIRING AS TO ITS JURISDICTIONAL POWER OVER A CERTAIN CLASS OF CASES, IN DECIDING WHETHER OR NOT TO ENGAGE IN PREENFORCEMENT REVIEW OF ADMINISTRATIVE ORDERS, BUT RATHER, WHETHER IT SHOULD EXERCISE ITS DISCRETION TO GRANT SUCH REVIEW, BASED ON THE EXISTENCE OF PARTICULAR EQUITABLE FACTORS.

In determining whether to engage in preenforcement review of administrative programs or orders, a court is not inquiring as to its jurisdiction over, and thus its power to decide, a particular class of cases but, rather, the inquiry is whether the court should exercise its discretion to grant preenforcement review; such inquiry is necessarily directed toward the existence of particular equitable factors on which a court makes a determination to either grant or withhold judicial review at the preenforcement stage.

15. EXCEPT FOR THOSE FEW ADMINISTRATIVE ACTIONS MADE UNREVIEWABLE BY LAW, QUESTION IN DETERMINING PREENFORCEMENT REVIEW IS NOT IF, BUT WHEN JUDICIAL REVIEW WILL TAKE PLACE.

Timing is the overriding issue in determining whether to undertake preenforcement review of agency programs or orders; except for extremely rare category of administrative actions explicitly made nonreviewable by law the question is not if judicial review will take place, but rather when it will occur.

16. PRINCIPLE OF ADDRESSING APPLICATION FOR PREENFORCEMENT REVIEW OF ADMINISTRATIVE ACTIONS TO DISCRETION OF THE COURT STEMS FROM BOTH THE EQUITABLE NATURE OF THE INJUNCTIVE AND DECLARATORY RELIEF INVARIABLY SOUGHT, AND PROVISIONS OF THE A.P.A.

Application for preenforcement review of administrative programs or orders is addressed to the district court's discretion; such principle stems from both the equitable nature of the injunctive and declaratory relief invariably sought in preenforcement challenges to administrative actions as well as provision of Administrative Procedure Act authorizing a court to withhold review of agency action unless the party seeking such review has no other adequate remedy in a court.

17. PREENFORCEMENT CHALLENGES TO F.T.C. PROGRAMS ARE WITHIN DISTRICT COURT'S SUBJECT MATTER JURISDICTION.

District court has subject matter jurisdiction of cases involving preenforcement challenges to Federal Trade Commission's line of business program and its corporate pattern reports program.

18. FITNESS OF ACTION AND HARDSHIP TO PARTIES FROM WITHHOLDING JUDICIAL REVIEW ARE THE TWO FACTORS FOR COURT'S CONSIDERATION IN DETERMINING WHETHER OR NOT TO ENTERTAIN A PREENFORCEMENT CHALLENGE.

Two factors are to be assessed in determining whether to utilize a court's equitable jurisdiction and entertain a preenforcement challenge to administrative action: fitness of the action for judicial decision and the hardship to the parties of withholding court consideration.

19. FINALITY OF ADMINISTRATIVE ACTION AND NATURE OF QUESTIONS FOR CONSIDERATION CONSTITUTE THE STANDARDS FOR DETERMINING WHETHER CHALLENGE IS FIT FOR PREENFORCEMENT REVIEW.

In determining fitness of the issues for judicial determination in a preenforcement challenge to administrative actions, the standard is essentially an inquiry into the finality of the challenged action, as well as an examination of the nature of the questions presented for decision.

20. FOR THE PURPOSE OF ASSESSING RISKS ATTENDANT ON NONCOMPLIANCE, ABSENT UNUSUAL CIRCUMSTANCES ATTENTION SHOULD BE DIRECTED TOWARD RISKS EXISTING DURING PERIOD PRIOR TO INSTITUTION OF ENFORCEMENT PROCEEDINGS.

Dominant purpose of preenforcement review of agency action is to prevent a party from being bludgeoned into compliance with some substantial requirement it contends is contrary to law; potential for such coercion occurs solely because liability for civil and criminal penalties for noncompliance may accumulate to ruinous levels while an agency's failure to seek enforcement precludes access to a judicial forum where complainant may obtain review of its contentions; hence, absent unusual circumstances, attention should generally be directed toward risks existing during the period prior to institution of enforcement proceedings for purpose of assessing the risks attendant on noncompliance.

21. ABSENT A FORUM WHERE COMPLAINANT MAY AIR ITS GRIEVANCES, NONCOMPLIANCE RISKS MUST BE MEASURED AS THEY STOOD AT INCEPTION OF LITIGATION.

Although in a preliminary injunction context, concession of Federal Trade Commission that no default notices would be issued prior to institution of enforcement proceedings served to immunize plaintiffs from any immediate irreparable harm stemming from imposition of any civil penalties, such concession was of no weight in determining whether to engage in preenforcement review of Commission's corporate pattern reports program, since for purpose of assessing the hardship of withholding re[1071]view, the risk attaching to noncompliance absent a forum where the complaint party may air its grievances must be measured as they stood at inception of the litigation.

22. DISMISSAL OR TRANSFER OF PREENFORCEMENT ACTION IS JUSTIFIED BY AGENCY'S INSTITUTION OF ENFORCEMENT PROCEEDINGS WITHIN A REASONABLE TIME.

Administrative agency's institution of enforcement proceedings within a reasonable time justifies dismissal or transfer of a previously filed preenforcement action.

23. DISMISSAL OR TRANSFER OF PREVIOUSLY FILED PREENFORCEMENT ACTION WAS WARRANTED SINCE F.T.C. INSTITUTION OF ENFORCEMENT PROCEEDINGS WITHIN 45 DAYS WAS SUFFICIENTLY PROMPT.

The 45-day delay in instituting proceeding seeking enforcement of Federal Trade Commission's line of business programs was sufficiently prompt so as to warrant dismissal or transfer of previously filed preenforcement action.

24. TRANSFER OF PREENFORCEMENT REVIEW ACTION TO ENFORCEMENT DISTRICT WAS NOT MILITATED AGAINST BY THE SUMMARY NATURE OF ENFORCEMENT PROCEEDINGS.

Fact that enforcement actions are summary in nature did not militate against transfer to enforcement district of action seeking preenforcement review of

Federal Trade Commission's line of business program and its corporate pattern reports program.

25. SINCE BOTH PLAINTIFFS' CHALLENGE AND F.T.C.'S ENFORCEMENT DEMANDS COULD BE ADJUDICATED IN THE ENFORCEMENT FORUM, TRANSFER OF INSTANT ACTION WOULD BE PREFERABLE TO ENFORCEMENT FORUM'S STAYING ITS PROCEEDINGS THEREBY ELIMINATING MULTIPLE FORUM PROBLEM.

Transfer to enforcement district of action seeking preenforcement review of Federal Trade Commission's line of business program and its corporate pattern reports program was preferable to the enforcement forum's staying its proceedings since not only would the latter fail to eliminate the problem of multiple forum but the enforcement forum could be the sole forum that could readily adjudicate both plaintiffs' challenges and the Commission's demands for enforcement.

26. BENEFIT THAT WOULD BE GAINED OUTWEIGHED WHATEVER INCONVENIENCE MIGHT RESULT FROM TRANSFER OF INSTANT ACTION TO ENFORCEMENT FORUM.

Fact that extensive briefs were prepared in action seeking preenforcement review of Federal Trade Commission's line of business program and its corporate pattern reports program did not militate against either dismissal or transfer of proceedings to district in which enforcement proceedings were or would be pending; whatever limited degree of inconvenience might result did not outweigh the benefit to be gained from a transfer.

27. GROUND THAT ENFORCEMENT PROCEEDINGS MUST BE ASSERTED AS A COMPULSORY COUNTERCLAIM DID NOT BAR TRANSFER OF PREENFORCEMENT CHALLENGES TO ENFORCEMENT FORUM.

Transfer to enforcement forum of preenforcement challenges to Federal Trade Commission's line of business program and its corporate pattern reports program was not barred on ground that enforcement proceedings must be asserted as a compulsory counterclaim and related injunction against Commission's attempts to bring enforcement actions in a forum other than that which preenforcement proceedings were pending would lead to either the undesirable result of multijudicial determination of the same issues or to complex transfer or pretrial consolidation problems.

28. THAT F.T.C. WOULD NOT BE ABLE TO JOIN ALL PREENFORCEMENT PLAINTIFFS DID NOT PRECLUDE TRANSFER OF PREENFORCEMENT REVIEW TO ENFORCEMENT DISTRICT.

Transfer to enforcement district of action seeking preenforcement review of Federal Trade Commission's line of business program and its corporate pattern reports program was not precluded on ground that Commission would not be able to join all of the preenforcement plaintiffs in an enforcement proceeding since, among other things, even if multiplicity of enforcement actions in numerous judicial district were required, a referral to judicial panel on multidistrict litigation would be a virtual certainty.

29. IN AND OF ITSELF, FILING A MOTION WITH JUDICIAL PANEL ON MULTIDISTRICT LITIGATION HAS NO AFFECT ON A DISTRICT COURT'S JURISDICTION OR POWER.

Filing of a motion with the judicial panel on multidistrict litigation in and of itself has no affect on the jurisdiction or power of a district court; hence, whether to await further action by the panel or rule on Federal Trade Commission's motion

to dismiss, stay or transfer to enforcement district action seeking preenforcement challenges to Commission's line of business program and its corporate pattern reports program was within the sound discretion of the [1072] court in the preenforcement action.

(Syllabus, with substituted captions, taken from 471 F.Supp. 1068)

On action seeking preenforcement review of F.T.C. LB and CPR Programs, court held that, given the magnitude of the corporations involved, compliance with the programs did not rise to the level of irreparable injury necessary to invoke injunctive relief, and that the court had, but would not exercise, its discretion to engage in preenforcement review but would transfer the proceeding to the district of enforcement, i.e., District of Columbia.

Preenforcement injunctive relief denied; actions transferred.

Richard F. Corroon, of *Potter, Anderson & Corroon*, Wilmington, Del., *Edward T. Tait, Lee A. Rau, John M. Wood, Stuart M. Gerson*, and *Thomas H. Reilly*, of *Reed, Smith, Shaw & McClay*, Washington, D.C., for plaintiffs and intervenor plaintiffs A.O. Smith Corp., et al. and Bemis Co., Inc., et al. in No. 75–15, and for American Air Filter Co., Inc., et al. and Bemis Co., Inc., et al. in No. 75–412.

William Simon, David C. Murchison, Harold F. Baker, J. Wallace Adair, John DeQ. Briggs, and *Stuart H. Harris*, of *Howrey & Simon*, Washington, D.C., for intervenor plaintiffs American Cyanamid Co., et al. in No. 75–412.

Donald J. Mulvihill, and *Gerald J. Brown*, of *Cahill, Gordon & Reindel*, Washington, D.C., for intervenor plaintiffs The Great Atlantic & Pacific Tea Co., Inc. in No. 75–15 and for Hoover Ball and Bearing Co. in 75–412.

Michael K. Wyatt, of *Steptoe & Johnson*, Washington, D.C., for intervenor plaintiff Atlantic Richfield Co. in No. 75–412.

Paul P. Welsh, of *Morris, Nichols, Arsht & Tunnell*, Wilmington, Del., for plaintiffs and intervenor plaintiffs Air Products & Chemicals, Inc., Allen-Bradley Co., Atlantic Richfield Co., Cargil, Inc., The Goodyear Tire & Rubber Co., C.I.T. Financial Corp., CPC International Inc., Hart Schaffner & Marx, Hobart Corp., Inland Steel Co., Thomas J. Lipton, Inc., Northwest Industries, Inc., Oscar Mayer & Co., Inc., Ross Industries, Inc., Square D Co., Sunstrand Corp., United States Gypsum Co., and Van Dorn Co.

Basil J. Mezines, of *Stein, Mitchell & Mezines*, Washington, D.C., for plaintiff C.I.T. Financial Corp.

Philip A. Lacovara, and *Gerald Goldman*, of *Hughes, Hubbard & Reed*, Washington, D.C., for plaintiffs Allen-Bradley Co. and Merck & Co., Inc.

Frank P. Cihlar, and *James R. Henderson*, of *Mayer, Brown & Platt*, Washington, D.C., for plaintiffs CPC International Inc., Cargill, Inc., Hart Schaffner & Marx, Inland Steel Co., Northwest Industries, Inc., Oscar Mayer & Co., Inc., Ross Industries, Inc. and Sunstrand Corp.

James F. Rill, and *Kathleen E. McDermott*, of *Collier, Shannon, Rill & Edwards*, Washington, D.C., for intervenor plaintiff Carpenter Technology Corp. in No. 75–412.

John F. McClatchey, and *Leslie W. Jacobs*, of *Thompson, Hine & Flory*, Cleveland, Ohio, for plaintiffs The Goodyear Tire & Rubber Company, Hobart Corporation, and Van Dorn Company.

John F. Bromley, of *Maclay, Lynch, Bernhard & Finger*, Washington, D.C., for plaintiff United States Gypsum Co.

John F. Graybeal, and *Robert C. Houser, Jr.*, of *Foley, Lardner, Hollabaugh & Jacobs*, Washington, D.C., for plaintiff Square D Co.

Edmund N. Carpenter, II, of *Richards, Layton & Finger*, Wilmington, Del., for plaintiffs and intervenor plaintiffs American Cyanamid Company, et al., The Great Atlantic & Pacific Tea Co., Inc., Carpenter Technology Corp., and Hoover Ball and Bearing Co.

Robert J. Lewis, Gen. Counsel, *Gerald P. Norton*, Deputy Gen. Counsel, *Gerald Harwood*, Asst. Gen. Counsel, *James P. Timony*, and *William A. Cerillo*, Dept. of Justice, Washington, D.C., for defendant Federal Trade Commission.

W. Laird Stabler, Jr., U.S. Atty., Dept. of Justice, Wilmington, Del., *Rex E. Lee*, Asst. Atty. Gen., *Jack E. Thorton, Jr.*, and *Harland F. Leathers*, Dept. of Justice, Washington, D.C., for Gen. Accounting Office.

OPINION

MURRAY M. SCHWARTZ, *District Judge*.

I. *Introduction*

Presently before the Court is a series of motions in a complex administrative law case[1] involving pre-enforcement challenges [1073] to two Federal Trade Commission ("FTC" or "Commission") programs, the Line of Business Program ("LB Program") and Corporate Pattern Reports ("CPR"). At issue are plaintiffs[2] motions for a preliminary injunction and summary judgment,[3] the Commission's cross-motion for

[1] To date some 24 separate civil actions have been filed in this district challenging various administrative orders issued under the two programs. They have been consolidated for disposition of the instant motions.

[2] "Plaintiffs" also include the various corporate entities that have intervened in the various actions. All interventions were by stipulation of the parties.

[3] Plaintiffs pursued summary judgment on the grounds that the LB and/or CPR Programs violate the following statutes and constitutional provisions: the Federal Reports Act, 44 U.S.C. § 3512; Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553; 5 U.S.C. § 7 6(2)(A); Section 6 of the Federal Trade Commission Act, 15 U.S.C. § 46;

(Continued)

summary judgment,[4] its motion to dismiss, stay or transfer and plaintiffs' motion to stay consideration of the Commission's motion to dismiss, stay or transfer. For reasons developed below the Court holds that plaintiffs are not entitled to preliminary injunctive relief and grants the FTC motion to transfer the instant actions. As a result, the issues posed by the cross-motions for summary judgment, all of which sought declaratory or permanent injunctive relief, are not treated on the merits in this opinion. Prior to discussing the issues which are reached, it is appropriate to develop the factual background surrounding the two contested programs.

II. *The LB Program*

The general facts regarding the LB Program have been extensively developed in three prior opinions insofar as the FTC's orders to file Form LB for fiscal year 1973 were concerned. See *A. O. Smith* v. *Federal Trade Commission ("A. O. Smith I")*, 396 F.Supp. 1108 (D.Del.1975); *A. O. Smith* v. *Federal Trade Commission ("A. O. Smith II")*, 396 F.Supp. 1125 (D.Del.1975); *A. O. Smith* v. *Federal Trade Commission*, 530 F.2d 515 (3d Cir. 1976). It is sufficient therefore to indicate that the LB Program was primarily designed to increase the accuracy and availability of data on industrial performance within specific lines of commercial activity.[5] The program, which was developed over a four year period commencing in 1970, sought to overcome the fact that standard forms of corporate financial reporting had become increasingly less meaningful as a result of what can best be described as conglomeratization, by requiring large diversified corporations to provide, *inter alia*, sales and cost data with respect to specific lines of product activity.[6] On March 26, 1974, the Commission approved 1973 Form LB and submitted it along with supporting statements to the Comptroller General for approval pursuant to the Federal Reports Act, 44 U.S.C. § 3512.[7] Following the Comptroller

Section 9 of the Census Act, 13 U.S.C. § 9; the Packers & Stockyards Act, 7 U.S.C. § 181 *et seq.*; and the Due Process Clause of the Fifth Amendment.

Because of serious reservations the Court had as to whether its pre-enforcement jurisdiction should be exercised in the instant cases at the time of the March 31st hearing, argument in support of the respective cross-motions for summary judgment was not heard at that time. In addition, because of the plaintiffs' failure to demonstrate the existence of irreparable injury in the course of the hearing, I also declined to hear any argument whatsoever with respect to probable success on the merits of any of plaintiffs' substantive claims.

[4] The Commission's cross-motion for summary judgment seeks judgment in its favor with respect to the various statutory and constitutional challenges raised to the LB and/or CPR programs by the plaintiffs. See note * * * page 1, *supra*.

[5] ME-100, Supporting Statement, FTC Form LB, 1974 Survey Version, July 1, 1975.

[6] *Id.*

[7] 73 Administrative Record ("Ad.Rec.") 9D, 9E. The Court previously ordered the Commission to certify all materials considered by the Commissioners in their August 2, 1974, promulgation of Orders to File Form LB. The purpose of the Court's order was to compile an administrative record in order that a reviewing court could assess, on an informed basis, the plaintiffs' allegations that the FTC's decision to adopt the LB Program was arbitrary and capricious. *See A. O. Smith* v. *Federal Trade Commission ("A. O. Smith III")*, 403 F.Supp. 1000 (D.Del.1975).

General's approval of a somewhat limited version [1074] of the form,[8] the Commission adopted a Resolution Requiring Annual Line of Business Reports from Corporations on August 2, 1974. This resolution, which subsequently appeared in the Federal Register, 39 *Fed. Reg.* 30377 (1974), led to Orders to File Form LB being served upon some 345 of the nation's largest commercial entities. Of those served, some 225 filed the required form for 1973[9] while the bulk of remaining recipients of the Orders chose to challenge the FTC's action in the courts.[10] On April 20, 1976, the Commission directed that its 1973 LB enforcement orders be withdrawn against all companies which had not complied. As a consequence, all summary judgment motions and requests for relief to the extent directed to the 1973 LB Orders have been rendered moot. However, the controversy over the '74 LB Orders and LB Program itself remains very much alive.

The factual context surrounding the 1974 Line of Business Form is somewhat different than its predecessor. On April 16, 1975, the Commission published a notice in the Federal Register announcing the availability for public inspection and comment of a proposed 1974 Line of Business Form. 40 *Fed.Reg.* 17081 (1975). The notice further indicated that the Commission invited written comments on the proposed form and that it intended to hold an open hearing for the purpose of receiving oral comments on the proposed form on May 20, 1975. 40 *Fed.Reg.* 17081, 17348. In addition, copies of the proposed 1974 Form LB and related materials were mailed at that time to all companies which had been previously served with an order to file Form LB for fiscal year 1973.[11] At the May 20, 1975, hearing on 1974 Form LB some twenty witnesses presented oral statements to the Commission including representatives of many of the plaintiffs in the instant cases.[12] On July 1, 1975, the Commission approved the final version of 1974 Form LB and transmitted it, along with a supporting statement, to the General Accounting Office for review pursuant to the Federal Reports Act, 44 U.S.C. § 3512.[13] On August 18, 1975, the General Accounting Office approved[14] 1974 Form LB for use by the Commission following its own solicitation of written comments. *See* 40 *Fed.Reg.* 28677. Immediately thereafter on August 20, 1975, the Commission authorized by resolution[15] the issuance of orders to file 1974 Form LB to some 453 companies. These orders, which were served

[8] ME-17.
[9] FTC Ex. AA.
[10] *See, A. O. Smith I, supra; A. O. Smith II, supra; A. O. Smith III, supra; A. O. Smith* v. *FTC*, 530 F.2d 515 (3d Cir. 1976).
[11] ME-81-6.
[12] ME-96.
[13] ME-100.
[14] ME-132.
[15] ME-174.

subsequent to the August 20th resolution, required that the completed forms be returned within 150 days of receipt.

Between August 25, 1975, and December 19, 1975, 178 recipients of the 1974 Form, including all the plaintiffs in the instant action, filed motions to quash. The motions were denied on December 19, 1975,[16] the Commission stating its reason for so doing in a 19 page statement. The Commission at that time also withdrew the 1974 LB orders with respect to nine corporations and indicated that as to the remaining movants, the Commission would refrain from issuing notices of default or otherwise attempting to recover civil penalties from any noncomplying company unless the Commission had already instituted a proceeding seeking to enforce its 1974 LB order against such company pursuant to section 9 of the FTC Act, 15 U.S.C. § 49.[17] To date some 276 companies have already filed 1974 Form LB or plan to do so shortly, while approximately 145 other companies have chosen to challenge the orders in pre-enforcement review proceedings. Of this latter group, roughly 25 percent requested pre-enforcement relief **[1075]** in this district while the remainder have instituted civil actions in the Southern District of New York.[18]

III. *Corporate Patterns Survey*

Commencing in mid August, 1975, the Commission served on each of the plaintiffs in this action an order requiring them to complete certain special reports ("CPR Reports") as part of its corporate pattern survey. It is these reports which have triggered this portion of the instant litigation.

The CPR Reports, the basic purpose of which is to provide the Commission with individual data on the 1,000 largest domestic manufacturing corporations for assistance in its enforcements efforts, economic studies and policy planning activities,[19] consists of two basic forms, CPR-1 and CPR–2.[20] CPR–1, by far the more inclusive and significant of the two forms, seeks data on the 1972 value of shipments from domestic manufacturing establishments broken down by product class and the 1972 sum of establishment sales for all domestic establishments of a reporting company that are engaged in nonmanufacturing activities. CPR-1 also seeks information on consolidat-

[16] ME-165.

[17] *Id.*

[18] FTC Ex. AA.

[19] 1975 Supporting Statement MX-15.

[20] The CPR Reports also include another form, CPR-S, which is merely designed to aid the Commission in determining whether the company receiving such form is among the 1,000 largest corporations and should, therefore, be required to file CPR-1 and CPR-2. Only C.I.T. Financial Corporation, the plaintiff in Civil Action No. 76-39, is challenging an order to file form CPR-S.

ed net sales and total assets as well as the listing of major acquisitions and disposals by reporting companies since calendar year 1972.[21] Form CPR-2, which is of far more limited applicability and scope, seeks information concerning minority interest domestic manufacturing companies and certain other types of joint ventures.[22]

The development of the instant CPR survey dates back to the fall of 1972 when the Commission authorized the collection of corporate patterns data for the year 1967. Following the submission of proposed CPR forms to the Office of Management and Budget in January, 1973, various changes were made including the base data year being changed to 1972.[23] The revised CPR forms were thereafter submitted to the GAO for review under the amended Federal Reports Act, 44 U.S.C. § 3512, in January of 1975. Following the receipt of numerous written comments received as a result of a notice in the Federal Register soliciting written comments from interested parties, GAO approved the CPR forms on March 24, 1975.[24] Final approval of the CPR survey occurred on July 29, 1975, and was published shortly thereafter in a Federal Register, 40 *Fed.Reg.* 34026 (1975), along with a Commission statement concerning the confidentiality of individual company data.[25] As a result of the resolution and statement, the Commission committed itself not to publish individual company data prior to January 1, 1978, or in other words, a point at least five years after the year for which the data was to be collected.[26]

Three hundred eighty-seven recipients of the special orders subsequently filed motions to quash. As a result of delay induced by the sheer bulk of issues and materials necessary to confront in determining the motions to quash, the Commission extended the filing deadline for the CPR reports to February 6, 1976, thereby obviating the **[1076]** original 90 day deadline.[27] On December 19, 1975, the Commission ruled upon the various motions to quash. Although the motions to quash the orders themselves were denied, the Commission withdrew the requirement that recipients complete item 5(d) of form CPR-1 and item 2(d) of form CPR-S.[28] The rulings were accompanied by a 32 page statement addressing the various arguments raised by the movants.[29]

[21] See MX-4. In general, the form required data for calendar year 1972, but under certain circumstances allows a corporation to report the requested information on a fiscal year basis when to do otherwise would require additional and unnecessary burdens. See MX-4 at 5.

[22] MX-5.

[23] See MX-15.

[24] MX-35. It should be noted that in addition to approving the forms as being in compliance with the Federal Reports Act, the GAO communication of March 24, 1975, also discussed a number of matters regarding the reports which it felt were "a source of continuing concern."

[25] MX-50.

[26] MX-50.

[27] MX-98.

[28] MX-102.

[29] MX-103.

As of February 17, 1976, some 647 recipients had submitted completed forms.[30] Between December 19, 1975, and February 6, 1976, the date on which most of the CPR forms were due, 12 suits were filed in this district challenging the CPR orders and seeking declaratory and injunctive relief. In all, some 70 companies are now before the Court as plaintiffs or intervenor plaintiffs seeking pre-enforcement review of the validity of the Commission's CPR orders.[31]

IV. *Requests for Preliminary Injunctive Relief*

Both sets of plaintiffs (CPR and LB) seek various forms of preliminary injunctive relief. In particular they all seek to enjoin FTC publication of data collected or to be collected under both programs and additionally seek a *pendente lite* restraint upon Commission institution of enforcement proceedings, issuance of default notices, attempts to collect civil penalties for noncompliance or criminal prosecutions for failure to file the requested data. The LB plaintiffs also seek to enjoin the FTC from any further implementation of the entire LB Program.

[1] The showings that must be made in this Circuit for issuance of a preliminary injunction are: 1) that the moving party has a reasonable probability of success on the merits; 2) that it will suffer irreparable injury *pendente lite* if the status quo is not maintained; 3) that the grant of a preliminary injunction would not substantially harm third parties interested in the outcome of the proceedings; and 4) that the public interest will not be adversely affected by the grant of preliminary injunctive relief. *A. O. Smith* v. *FTC*, 530 F.2d 515, 524-525 (3d Cir. 1976); *Delaware River Port Authority* v. *Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 919-20 (3d Cir. 1974); *A. O. Smith I, supra; A. O. Smith II, supra.*

In addition to challenging the movants' assertions regarding probable success on the merits, the Commission takes issue with plaintiffs' claims of irreparable injury. Accordingly some perspective on the issue of irreparable injury is in order. As recently re-emphasized in *A. O. Smith* v. *FTC, supra*, 530 F.2d at 525–526 (3d Cir. 1976), the substance of this requirement "is that the feared injury or harm be irreparable—not merely serious or substantial. 'The word means that which cannot be repaired, retrieved, put down again, atoned for * * *. Grass that is cut down cannot be made to grow again; but the injury can be adequately atoned for in money. The result of the cases fixes this to be the rule: the injury must be of a peculiar nature, so that

[30] FTC Ex. Z.

[31] In addition, 65 companies have sued the Commission in the Southern District of New York challenging the Commission's CPR orders in similar pre-enforcement actions. See *Chamber of Commerce* v. *FTC*, Civil Action No. 76-128 and related cases.

compensation in money cannot atone for it * * *.' " *Id.* at 525 quoting from *Gause* v. *Perkins*, 3 Jones Eq. 177, 69 Am.Dec. 728 (1857). *See generally*, O. Fiss, *Injunctions*, 9–27 (1972).

[2] The plaintiffs have advanced various arguments to demonstrate the existence of irreparable injury. Although some of the reasons have been urged by only one set of plaintiffs, i.e., either the LB plaintiffs or CPR plaintiffs, they will be treated together except to the extent that the specific factual context of each program requires differentiation. Both sets of plaintiffs point to the general burden of compliance required by the two programs. More spe[1077]cifically, the CPR plaintiffs point to what they describe as "unwarranted risks" stemming from their current choice as to compliance versus noncompliance. Among these so-called "risks" are such factors as the long lead time[32] allegedly required should a company eventually elect to comply. The lead time problem is exacerbated by the additional incentives to provide good quality data[33] that assertedly exist by virtue of the risk that recipients of the CPR Orders or their agents may be prosecuted should they provide misleading data and increased difficulty of data retrieval with the passage of time. Reduced to its essentials this argument appears to imply that the risks attaching to noncompliance are so great as to push one inexorably into compliance over a period of time should prompt review of their challenges not be forthcoming.

This argument seems to be seriously misplaced. While the dilemma of compliance versus non-compliance is most assuredly relevant to the issue of hardship to the parties of withholding court consideration and is thus properly considered with respect to the issue of this Court's exercise of pre-enforcement review, it proves nothing regarding irreparability. More importantly, the Third Circuit has held the burden of compliance itself, being an ordinary unrecoverable business expense resulting merely in a loss of profits, cannot, without a demonstration of some peculiar resulting harm, be considered an irreparable injury for preliminary injunction purposes. *A. O. Smith* v. *FTC*, *supra*, 530 F.2d at 527-528. Since nothing even remotely approximating any peculiar harm has been advanced by the CPR plaintiffs it is clear that they cannot claim to be irreparably injured should compliance ultimately prove to be necessary. In addition, the burden of compliance for the CPR reports is significantly less than that attaching to the 1973 Form LB, a level of burden which the Court of Appeals found specifically lacking in terms of irreparability.

[3] The LB plaintiffs attempt to raise a new wrinkle by urging that the additional burden of a continuing program, when compounded by the changes instituted from year to year by the Commission,

[32] *See* e.g., MX-72 at 2; MX-85 at 3; MX-86 at 7.
[33] *See* e.g., MX-72 at 2; MX-86 at 7; MX-99 at 10-11.

irreparably injure them by preventing adequate planning with regard to utilization of their corporate resources. The continuing nature of the LB program does not change the business expense character of the costs of compliance. Further there has simply been no credible evidence to support any claim that corporations of plaintiffs' magnitude are being so hampered in their future planning as to sustain any significant injury, let alone peculiar and unrecoverable harm.

Both groups also seek to enjoin the publication of any data already collected or to be collected under either program. The CPR plaintiffs simply analogize the proposed publication of what they claim will be seriously misleading data to defamatory material and further rely upon *GTE Sylvania, Inc.* v. *Consumer Product Safety Commission*, 404 F.Supp. 352 (D.Del.1975), for the proposition that government publication of misleading data may be preliminarily enjoined. The LB plaintiffs on the other hand, make a more complex, but nonetheless equally meritless, argument. They urge that the data collected to date will be so misleading as to cause substantial and serious errors to those relying upon the data.[34] The harm they posit from such allegedly improvident reliance is that industry-wide antitrust enforcement proceedings might be brought or that economically unwarranted competition might be unleashed upon them.

[4,5] Although the FTC questions the standing of the plaintiffs to challenge the use of data submitted by other corporations, it is not necessary to reach that issue as a variety of other reasons preclude preliminary injunctive relief of the nature sought by plaintiffs. First, as to CPR the Commission has bound itself not to publish any data [1078] *before* January 1, 1978. As a result, the remoteness of the asserted "danger" totally removes the need for *pendente lite* restraints since there is neither any immediacy or imminence to the alleged harms they seek to avoid. Secondly, the harms posited by the LB plaintiffs, i.e., industry-wide enforcement actions or unwarranted competition, are mere speculations largely unsupported by facts and, in any event, do not rise to a level of substantial and irreparable injury. As defendants in a now-hypothetical antitrust suit based on LB data, the instant plaintiffs would be able to challenge the accuracy of such data and thus possess an adequate legal remedy. Moreover, the mere fact of competition can never, by itself, be considered irreparable injury since it is entirely possible that the mythical new competitors might themselves be the entities crushed in the mortar and pestle of supply and demand. Finally, the reliance on *GTE Sylvania* is misplaced. There, the Court enjoined the publication of specific statistical data demonstrated to be misleading. Further, not only did

[34] *See*, e.g., ME-191.

the data directly relate to named television manufacturers, but the agency had already voted to publish the challenged data. Here, by contrast, the data, if and when published, will be aggregated on industry or product lines and thus not directly related to particular companies. In addition, the Commission's own confidentiality guidelines prevent its publication of individual company data.[35] Finally, the fact that the Commission has not yet voted to publish the aggregated data currently in its possession[36] prevents a conclusion that in its absence of a preliminary injunction such publication would occur and cause irreparable injury.

Plaintiffs also seek preliminary injunctive relief against FTC issuance of default notices, institution of enforcement proceedings pursuant to section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, or attempts to collect civil penalties for failure to file the requested reports pursuant to section 10, 15 U.S.C. § 50. None of these requests is granted since, as to each, there has been no demonstration that, in the absence of a *pendente lite* restraint, the plaintiffs will be irreparably injured.

[6–8] First, as to default notices, it must be borne in mind that such notices, by themselves, carry no adverse consequences. *Aluminum Company of America* v. *FTC,* 390 F.Supp. 301, 309 (S.D.N.Y.1975). Moreover, there is no requirement that the Commission issue notices of default under section 10[37] as a pre-condition to the commencement of inandamus-enforcement proceedings under section 9.[38] *Id.* 15 U.S.C. **[1079]** §§ 49, 50. Plaintiffs point to a risk that they will be "branded [as] defaulters" and thus injured. This can most kindly be characterized as a makeweight argument. The only effect of a default notice is to fix the beginning of a 30-day period which must expire before civil penalties for non-compliance may attach. Section 10, 15 U.S.C. § 50.

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[35] See 39 *Fed.Reg.* 30970 (1974).

[36] Although the Commission clearly intends *at some point* to publish aggregated LB data, 40 *Fed.Reg.* 30970 (1974), the absence of any proof that they intend to publish the data during the pendency of this litigation serves to render impossible a finding that the companies will suffer *immediate* and irreparable harm.

[37] Section 10, 15 U.S.C. § 50 provides, in part, that:

> "If any persons, partnership, or corporation required by sections 41 to 46 and 47 to 58 of this title to file any annual or special report shall fail to do so within the time fixed by the Commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States brought in the case of a corporation or partnership in the district where the corporation or partnership has its principal office or in any district in which it shall do business, and in the case of any person in the district where such person resides or has his principal place of business. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States." As amended, Pub.L. 93-637, Title II, § 203(c), 88 Stat. 2199 (1975).

[38] Section 9, 15 U.S.C. § 49 provides, in part, that:

> "Upon the application of the Attorney General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person, partnership, or corporation to comply with the provisions of sections 41 to 46 and 47 to 58 of this title or any order of the Commission made in pursuance thereof."

See, U. S. v. *San Juan Lumber Co.*, 313 F.Supp. 703, 705 (D.Colo.1969); *Aluminum Company of America* v. *FTC*, *supra* at 309. Similarly, the plaintiffs are not entitled to enjoin the Commission from seeking civil penalties, *if*[39] it decides to do so with regard to non-complying recipients of '74 LB and CPR orders. The non-issuance of default notices means that civil penalties cannot begin to accrue prior to the passage of 30 days from the point that any such notices become a reality. As a result it is obvious that no injury, whether irreparable or not, can now befall the plaintiffs insofar as civil penalties are concerned. Further, should default notices ever issue, the plaintiffs would be able to seek a stay of civil penalties during the pendency of a good-faith challenge to the validity of the Commission's order. *See, St. Regis Paper Co.* v. *U. S.*, 368 U.S. 208, 225–227, 82 S.Ct. 289, 299–300, 7 L.Ed.2d 240, 252–253 (1961); *Genuine Parts Company* v. *FTC*, 445 F.2d 1382, 1394–5 (5th Cir. 1971); *Continental Baking Company* v. *Dixon*, 283 F.Supp. 285 (D.Del.1968); *Aluminum Company of America* v. *FTC*, *supra* at 309. *Accord, Brown & Williamson Tobacco Corp.* v. *Engman*, CCH Trade Reg.Rptr. ¶ 60,473 (S.D. N.Y. Aug. 28, 1975), *aff'd* 527 F.2d 1115, CCH Trade Reg.Rptr. ¶ 60,649 (2d Cir. 1975). Moreover, the fact that in this case notices of default cannot issue in the absence of a pending enforcement proceeding not only underscores the lack of imminence in this context, but also guarantees the existence of a forum where plaintiffs may seek a *pendente lite* stay of civil penalties. Finally, the Court of Appeals for the Third Circuit in an analogous context has indicated that a $100 a day civil penalty is *de minimis* as applied to corporations of the magnitude served with the CPR orders and thus, absent unusual circumstances not present here, cannot be considered as an irreparable injury. *A. O. Smith* v. *FTC*, 530 F.2d 515, *supra*, at 528.

[9] Plaintiffs' request for preliminary injunctive relief with respect to the institution of enforcement proceedings must also be denied. Three reasons are proffered as to why the plaintiffs will suffer irreparable injury should enforcement proceedings be commenced as to them. They first assert that the sole issue in an enforcement proceeding under section 9, 15 U.S.C. § 49,[40] is "the enforceability of the [Commission's] orders."[41] As a result, they contend that they will be unable to raise the challenges that have been advanced in these pre-enforcement actions. This argument is without merit since the concept of enforceability as defined by plaintiffs must subsume the issues of validity and burdensomeness. Moreover, the challenges to the validity of the LB and CPR programs, and the respective sets of orders issued

[39] The Commission in the absence of enforcement proceedings, has agreed not to issue notices of default without which civil penalties may not be imposed upon any company choosing not to file either '74 Form LB or the CPR forms.

[40] *See* note 40, *supra*.

[41] Docket Item 68, Civil Action No. 75-412 at 140.

thereunder, raised by plaintiffs in the instant litigation may be asserted with equal effect in an enforcement proceeding. *Aluminum Company of America* v. *FTC, supra; Brown & Williamson Tobacco Company* v. *Engman, supra* at ¶ 67,675; *General Electric Company* v. *FTC,* 411 F.Supp. 1004, 1011 (N.D.N.Y. 1976). *Cf. A. O. Smith* v. *FTC, supra,* 530 F.2d at 526; *General Motors Corporation* v. *Volpe,* 321 F.Supp. 1112, 1125 (D.Del.1970). *Accord, First National City Bank* v. *FTC,* CCH Trade Reg.Rptr. ¶ 60,671 (S.D.N.Y.1975).

[10] The second argument advanced by plaintiffs to demonstrate their belief regarding the fundamental inadequacy of an enforcement proceeding is that they will be precluded from necessary discovery because **[1080]** of the summary nature of such proceedings. In approaching this issue the Court has the twin advantages of recent guidance from the Third Circuit and nearly a year of managing and defining the applicable scope of discovery with respect to the '73 LB litigation. The Court's holding of last year that irreparable injury would occur because the scope of discovery in an enforcement proceeding is far narrower than in a plenary civil suit was premised, at least in part, on an assumption that was subsequently vitiated by this Court in *A. O. Smith III,* namely that discovery in pre-enforcement review would be unbridled. Instead, applying the provisions of Fed.R.Civ.Proc. 26(b)(1) which require that the scope of discovery be "relevant to the subject matter involved in the pending action" and, after analysis of the issues posed in this particular judicial review of administrative action, I sharply circumscribed the compass of discovery available to the plaintiffs. *See A. O. Smith III, supra* at 403 F.Supp. 1013. The Third Circuit has treated the remaining degree of variation between the scope of discovery in summary enforcement proceedings and a plenary pre-enforcement review of administrative action as non-existent or minimal for preliminary injunction purposes. *See A. O. Smith* v. *FTC, supra,* 530 F.2d at 526–527. In any event, the fact that potential differences are simply inchoate possibilities precludes issuance of a preliminary injunction on this basis since, as the Third Circuit has now held, positing a finding of irreparable injury on such a basis would seriously undermine the irreparability requirement which serves as an equitable restraint on the exercise of a court's extraordinary injunctive powers. *Id.* at 526.

[11] Plaintiffs also suggest that the Comptroller General would not be amenable to suit in an enforcement proceeding with the result that they would be irreparably injured thereby. However, the plaintiffs have simply failed to carry their burden of demonstrating that absent the judicial imposition of restraint during the course of this litigation they will be unable to join the Comptroller General as a party in an enforcement proceeding or that the failure to do so would injure them

in any material fashion. For example, there is nothing that would prevent them from petitioning the enforcement court to join the Comptroller General as a party. *See General Electric Company* v. *FTC*, *supra*, 411 F.Supp. at 1011. Alternatively, they might file another civil action against the Comptroller General in the enforcement forum and seek to thereafter consolidate it with the enforcement action. *Cf. Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 155, 87 S.Ct. 1507, 1519, 18 L.Ed.2d 681, 695 (1967). The Court does not mean to indicate that these are necessarily wholly viable options that would be embraced by an enforcement tribunal. However, the fact that plaintiffs have not made any substantial attempt to demonstrate the unavailability of these courses renders this argument an untenable basis for a finding of irreparable injury. In fact, the transfer, and stay pending transfer, that are granted below guarantee that the Comptroller-General will remain a party in the enforcement forum, and thus provides an incentive to seek consolidation with the enforcement proceeding in order to insure, if necessary, his presence. *See, General Electric Company* v. *FTC*, 411 F.Supp. 1011 (N.D.N.Y.1976).

[12] Finally, plaintiffs claim that irreparable injury in the form of criminal penalties will descend upon them without a preliminary injunction. This argument deserves little judicial attention beyond observing that the criminal provisions of section 10,[42] 15 U.S.C. § 50, do not appear to [1081] apply to corporations,[43] *see A. O. Smith* v. *FTC*, *supra*, 530 F.2d at 524, and that, in any event, the plaintiffs "have failed to prove that absent an injunction *pendente lite* they would be subject to criminal sanctions." *Id.* at 529.

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[42] 15 U.S.C. § 50, provides, in part, that:

"Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

"Any person who shall willfully make, or cause to be made, any false entry of statement of fact in any report required to be made under sections 41 to 46 and 47 to 58 of this title, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any person, partnership, or corporation subject to said sections, or who shall willfully neglect to fail to make, or to cause to be made, full, true and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such person, partnership, or corporation or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such person, partnership, or corporation or who shall willfully refuse to submit to the Commission or to any of its authorized agents, for the purpose of inspection, and taking copies, any documentary evidence of such person, partnership, or corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment." As amended, Pub.L. 93-637, Title II, § 203(c), 88 Stat. 2199 (1975).

[43] This conclusion as to the non-applicability of criminal provisions to corporations is strengthened by a recent Congressional amendment of section 10 which, *inter alia*, extended the coverage of *civil* penalties from corporations to "persons, partnerships or corporations." Pub.L. 93-637, § 203(c), 88 Stat. 2199 (1975). By contrast Congress left unchanged the provisions regarding the applicable scope of criminal penalties contained in section 10, which continue to apply solely to "persons" in a context which precludes any argument that "person" may also include corporations. See note 45, *supra*.

As a result of the foregoing, plaintiffs' various requests for injunctive relief are denied on the ground that they have failed to demonstrate the existence of irreparable injury. Further, this determination precludes reaching the question of whether the plaintiffs have demonstrated a reasonable probability of success on the merits. *Cf. A. O. Smith* v. *FTC*, 530 F.2d 515 (3d Cir. 1976).

V. *Exercise of Pre-Enforcement Review*

[13] Of prime importance with regard to the '74 LB and CPR Orders is whether this Court should exercise its discretion and engage in pre-enforcement review of the two programs and their respective orders. For reasons detailed below the Court declines the invitation to exercise its pre-enforcement jurisdiction with respect to the CPR cases and instead transfers those cases to the District of Columbia where, in all likelihood, they will be consolidated with the now-pending CPR enforcement actions recently instituted by the Commission. Similarly, the '74 LB cases will be transferred subject to formal institution of the imminently-forthcoming enforcement proceedings in the District of Columbia.

[14–16] At the outset some conceptual observations should be made regarding the nature of pre-enforcement jurisdiction. First, it is clear that in determining whether to utilize pre-enforcement jurisdiction a court is not inquiring as to its jurisdiction over, and thus its *power* to decide, a particular class of cases. Note, "Jurisdiction to Review Administrative Action: District Court or Court of Appeals," 88 *Harv.L.Rev.* 980, 983–4 (1975); Comment, "Pre-Enforcement Review of Administrative Regulations," 42 *S.Cal.L.Rev.* 505, 506–7 (1969). *See generally*, Comment, "Timing of Judicial Review Under the Administrative Procedure Act," 56 *Cal.L.Rev.* 1491 (1968). Rather, the inquiry is whether the Court should exercise its discretion to grant pre-enforcement review. This inquiry is necessarily directed towards the existence of particular equitable factors upon which a court makes a determination to either grant or withhold judicial review at the pre-enforcement stage.[44] See, *Note, supra*, 88 *Harv.L. Rev.* at 983–4; *Comment, supra*, 42 *S.Cal.L. Rev.* at 506–7; *General Electric Company* v. *FTC*, 411 F.Supp. 1004, 1007, 1009 (N.D.N.[1082]Y.1976). *Cf. General Motors Corporation* v. *Volpe, supra*, 457 F.2d at 923. Secondly, the overriding issue involved in determining whether to exercise pre-enforcement jurisdiction is one of timing. *See Comment, supra*, 42 *S.Cal.L.Rev.* at 506–7. *See generally, Comment, supra*, 56 *Cal.L.Rev.* 1491. Thus, except for the extremely rare category of administrative actions that are explicitly made unreviewable by law, the question is

[44] For an approach which would blur the above distinction, see *Floersheim* v. *Engman*, 161 U.S.App.D.C. 30, 494 F.2d 949 (1973), criticized in *Note, supra*, 88 Harv.L.Rev. at 992, n. 75.

not *if* judicial review will take place, but rather *when* it will occur. *Cf. Continental Air Lines, Inc.* v. *C.A.B.*, 522 F.2d 107, 128 (D.C.Cir. 1974). Finally, the decision whether to exercise pre-enforcement jurisdiction is discretionary. This stems both from the equitable nature of the injunctive and declaratory relief invariably sought in pre-enforcement challenges to administrative action, *see Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148–9, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681, 691 (1967), and section 10(c)[45] of the Administrative Procedure Act which authorizes a court to withhold review of agency action unless the party seeking such review possesses "no other adequate remedy in a court." 5 U.S.C. § 704. *Brown & Williamson Tobacco Corp.* v. *Engman*, CCH Trade Reg.Rep. ¶ 60,637 (S.D.N.Y. Nov. 5, 1975) at 67,674. *Accord, General Motors Corporation* v. *Volpe*, 321 F.Supp. 1112, 1124–6 (D.Del.1970).

[17–18] The Commission's motion to dismiss sharply challenges the Court's exercise of pre-enforcement jurisdiction with respect to both the '74 LB orders and the CPR Programs.[46] That challenge focuses attention on the *Abbott Labs* trilogy,[47] where the Supreme Court delineated two factors to be assessed in determining whether to utilize a court's equitable discretion and entertain a pre-enforcement challenge: "[t]he problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs* v. *Gardner, supra*, 387 U.S. at 149, 87 S.Ct. at 1515, 18 L.Ed.2d at 691.

[19] The "fitness of the issues for judicial decision" standard is essentially an inquiry into the finality of the challenged administrative action, as well as an examination of the nature of the questions presented for decision. *See Id.* at 149–52, 87 S.Ct. at 1515–17, 18 L.Ed.2d at 691–93. In the instant cases there is no question that the Commission's actions in adopting the LB and CPR Programs and serving orders to file the '74 LB and CPR Forms are final. *A. O. Smith* v. *FTC, supra*, 530 F.2d at 524. In addition, all issues posed by the litigants for decision in both sets of cases are purely legal. *See Abbott Labs, supra*, 387 U.S. at 149, 87 S.Ct. at 1515, 18 L.Ed.2d at 691. Thus, there can be no serious dispute with a conclusion that the issues raised for pre-enforcement review are indeed fit for judicial decision.

Analysis of the other factor, namely hardship to the parties of

[45] 5 U.S.C. § 704 provides, in part, that:

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to a judicial review. * * *"

[46] No contention is raised as to whether there is a lack of subject-matter jurisdiction over the instant controversy since it is clear that these cases all raise matters that are within the court's jurisdiction by virtue of either or both 28 U.S.C. §§ 1331 and 1337.

[47] *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *Toilet Goods Association* v. *Gardner*, 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967); *Gardner* v. *Toilet Goods Association*, 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967).

withholding review, is far more troublesome. Little can be gained at this point from large-scale quotation of relevant passages from the *Abbott Labs* trilogy in view of the fact that both this court and the Third Circuit have recently provided an exhaustive presentation and analysis of the differing factual contexts presented in each branch of the trilogy. *See A. O. Smith* v. *FTC*, 530 F.2d 515 (3d Cir. 1976); *A. O. Smith I, supra; A. O. Smith II, supra.* Rather, it is sufficient to quote the Circuit's recent teachings on the trilogy's import:

> Thus, it appears from the Abbott Laboratories trilogy that one seeking discretionary relief may not obtain pre-enforce[1083]ment judicial review if there is no immediate threat of sanctions for noncompliance, or if the potential sanction is de minimis. Conversely, the court should find agency action ripe for judicial review if the action is final and clear-cut, and if it puts the complaining party on the horns of a dilemma: if he complies and awaits ultimate judicial determination of the action's validity, he must change his day-to-day course of conduct, for example, by undertaking substantial preliminary paperwork, scientific testing and record keeping, or by destroying stock; alternatively, if he does not comply, he risks sanctions or injuries including, for example, civil and criminal penalties, or loss of public confidence. *A. O. Smith* v. *FTC*, 530 F.2d at 524.

Thus, it is clear that a significant, if not the sole, purpose of pre-enforcement review is to remove a party from the horns of the above quoted dilemma.

[20] Review of the factual background of each program and its respective orders indicates that one of the two horns *may* well be lacking with respect to each program. At the time the Commission denied the various motions to quash filed by recipients of '74 Form LB, it resolved not to issue default notices or seek civil penalties from any non-complying company without having first instituted an enforcement proceeding against such party.[48] Since criminal penalties do not apply to the corporate recipients of the '74 LB orders[49] and since, unlike *Abbott Labs*, the plaintiffs do not face any loss of public confidence as a function of non-compliance, it appears that "there is no immediate threat of sanctions for non-compliance." Plaintiffs take issue with this judgment and assert that because civil penalties may be instituted once enforcement proceedings are underway, they still face risks attaching to non-compliance with the result that both horns of the dilemma remain extant. Some authority arguably supportive of plaintiffs' position does exist, *Cf. Gardner* v. *Toilet Goods Association, supra*, 387 U.S. at 172, 87 S.Ct. at 1529, 18 L.Ed.2d at 708. Nonetheless, I believe a functional analysis of the relevant case law indicates that the dominant purpose of pre-enforcement review is to prevent a party subject to administrative action from being bludgeoned into compli-

[48] See notes 16 and 17 pages 1074-075, *supra*.
[49] See *A. O. Smith* v. *FTC*, *supra*, 530 F.2d at 524, n. 9.

ance with some substantial requirement it contends is contrary to law. The potential for such coercion occurs solely because liability for civil and criminal penalties for non-compliance may accrue and accumulate to ruinous levels while an agency's failure to seek enforcement of its orders precludes access to a judicial forum where the complainant may obtain review of its contentions. *Cf. Abbott Laboratories* v. *Gardner, supra*, 387 U.S. at 152, 87 S.Ct. at 1517, 18 L.Ed.2d at 693; *St. Regis Paper Company* v. *United States*, 368 U.S. 208, 226–7, 82 S.Ct. 289, 299–300 7 L.Ed.2d 240, 253 (1961); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 654, 70 S.Ct. 357, 369, 94 L.Ed. 401, 416 (1950). *See generally* "The Supreme Court, 1966 Term," 81 *Harv.L.Rev.* 69,225–31 (1967). Given the dominant purpose of pre-enforcement review, attention should generally be directed toward risks existing during the period prior to institution of enforcement proceedings for purposes of assessing the risks attendant upon non-compliance.[50] For **[1084]** reasons that will appear subsequently it is not necessary to definitively resolve this issue and thus categorically reject or accept the exercise of pre-enforcement review. *Cf. Brown & Williamson Tobacco Company* v. *Engman, supra* at 67,674.

Similarly, it appears that one of the twin branches that comprise the horns of plaintiffs' alleged dilemma may be absent in the context of the CPR program. However, unlike the '74 LB Form where the risks of non-compliance may be ephemeral, it is a significant burden of compliance which is argued by the FTC to be lacking with respect to the CPR forms. Basically, the Commission urges that so little effort is needed to complete the required forms that they can hardly be said to have a significant effect on the plaintiffs' day-to-day conduct or to require plaintiffs "to commit substantial resources" to achieve compliance. In particular it points to an estimate of 30 man-hours as an average respondent reporting burden,[51] a figure which is apparently based on rough approximations of completion times for similar past surveys and a pre-test of the CPR forms conducted in early 1973.[52] However, the agency in developing that estimate did acknowledge the

[50] The above statement assumes an absence of unusual circumstances surrounding the mode or nature of administrative enforcement which may serve to create additional risks which attach solely to such an enforcement proceeding. Where unusual circumstances are present, they must be considered in the evaluation of risks extant during the period prior to the bringing of enforcement proceedings. A clear example of unusual circumstances stemming from the nature of certain enforcement mechanisms was present in *Gardner* v. *Toilet Goods Ass'n*, *supra*, where a pre-condition to commencement of enforcement proceedings, either injunctive, criminal or seizure, was an administrative determination that certain cosmetics were "adulterated" and thus unsafe, a derogatory label that in and of itself would carry serious consequences for the cosmetic industry. *See Id.*, 387 U.S. at 172, 87 S.Ct. at 1529, 18 L.Ed.2d at 708. *See also Abbott Laboratories* v. *Gardner, supra* (drugs must be considered "misbranded" before enforcement remedies ripen). By contrast no unusual circumstances appear in the instant cases with the result that institution of enforcement proceedings does not trigger any risk of a serious loss of "public confidence" in a "sensitive industry." *Cf. Id.*, 387 U.S. at 153, 87 S.Ct. at 1517, 18 L.Ed.2d at 694.

[51] MX–15 at 12.

[52] *Id.*

fact that the completion burden rises proportionately with the size, diversification and structural complexity of the respondent.[53] Since the CPR forms are directed to the 1000 largest domestic manufacturing firms it can be assumed that some percentage of the CPR respondents will exceed the Commission's compliance estimates by a significant margin.

The record is somewhat sparse in terms of facts adduced by the plaintiffs to demonstrate their view of the CPR burden for purposes of supporting their claim that the program has a direct day-to-day impact on the conduct of their respective business affairs. For example, an affidavit submitted by the comptroller of one of the plaintiffs indicates a reporting cost of approximately $50,000.[54] However, this estimate was based in part on the burden stemming from a particular part of CPR Form-1 that required a reporting company to rank its status within each product class. Because this particular item was withdrawn by the Commission at the time it denied the various motions to quash,[55] these cost estimates can no longer be treated as sound in view of their reliance on a now discarded requirement which one company opined could cost, by itself, anywhere from $20,000 to $50,000.[56] An affidavit not specifically relying on the burden caused by the deleted item was submitted which suggests a compliance cost of $75,000 for a particular company.[57] However, the basis for the estimate was predicated upon that reporting company supplying data with a much higher degree of accuracy than that required by the Commission for completion of the CPR form.[58]

In addition to the financial costs of compliance, plaintiffs also assert that the information sought by the CPR forms is rendered confidential under section 9 of the Census Act[59] by virtue of its previous submission to the Census Bureau. Thus they urge the very act of compliance has significant costs for them in terms of mooting their claims of confidentiality. Added to that is the fact that although much of the information sought by the CPR form is contained in plaintiffs' 1972 census reports, the categories used to classify the census data were based on a 1967 version of the [1085] Standard Industrial Classification ("SIC") codes. Since the CPR forms require use of product class codes derived from a later and more detailed version of the SIC codes, the plaintiffs claim an additional impact stemming from their burden of compliance, in that they will have to modify and reclassify the data contained on their census reports to the extent that it reflects

[53] *Id.* at 12-3.
[54] See MX-72, ¶ 7.
[55] MX-103 at 2.
[56] See MX-93.
[57] See MX-114.
[58] This is especially true where the CPR forms allow a company to employ "best estimates." See MX-4 at 1.
[59] 13 U.S.C. § 9.

shipment values within changed product codes. However, this may not be a potent stumbling bloc since the CPR forms do not require the designated information to come from any particular source.[60]

[21] Whatever difficulties exist with respect to the first horn of the dilemma, the day-to-day impact of the reporting requirements, there is no question that plaintiffs do indeed bear substantial risks of non-compliance in the CPR context. Although the Commission stated during a court hearing held on March 31st that no notices of default would be issued prior to the institution of enforcement proceedings against noncomplying CPR recipients,[61] the Court is not free to give any weight whatsoever to that concession. Unlike the preliminary injunction context[62] where such a concession adequately serves to immunize plaintiffs from any immediate irreparable harm possibly stemming from the imposition of civil penalties, the Supreme Court has clearly indicated that for purposes of assessing the hardship to the parties of withholding review, the risks attaching to non-compliance in the absence of a forum where the complaining party may air its grievances must be measured as they stood at the inception of the litigation. *See Abbott Laboratories* v. *Gardner, supra,* 387 U.S. at 154, 87 S.Ct. at 1518, 18 L.Ed.2d at 694. As a result, risks of non-compliance continue to exist for recipients of orders to file the CPR forms. However, as with '74 LB, for reasons developed below, there is no occasion at this juncture for the Court to categorically accept or reject the exercise of pre-enforcement review with respect to plaintiffs' challenges to the CPR program.

VI. *The Commission's Motion to Dismiss, Stay or Transfer*

By its motion to dismiss, stay or transfer the Commission seeks to have the court either dismiss the CPR litigation or transfer it to the District of Columbia where enforcement proceedings have now been brought.[63] As to the '74 LB cases the agency is, in essence, requesting a stay to allow it to institute enforcement proceedings in the District of Columbia, followed by a dismissal or transfer of these actions to the enforcement forum.

[22] The basic concept behind a dismissal or transfer of these cases is to minimize the multiplicity of forums that must adjudicate the issues raised here while also assuring an adequate forum under the Administrative Procedure Act, 5 U.S.C. § 704. The problem of multiple

[60] See MX-108 at 13.

[61] Docket Item 197, Civil Action No. 75-15 at 102.

[62] See note 39 page 1079, *supra* and accompanying text.

[63] At the point the Commission's Motion to Dismiss, Stay or Transfer was filed no enforcement proceedings were pending as to the CPR plaintiffs. See discussion *infra* at 1079. Thus, its motion sought a stay in those cases to permit it to commence such enforcement proceedings. Since those proceedings have now matured into a reality, there is no reason to address the Commission's request for a stay insofar as the CPR pre-enforcement actions are concerned.

institution of actions in this immediate context was recognized in *Abbott Labs.* In that case Justice Harlan suggested transfer pursuant to 28 U.S.C. § 1404(a),[64] a stay of all but one action pending conclusion of that single action or a discretionary dismissal in favor of similar or related litigation pending elsewhere as methods by which the spectre of multiple actions may be resolved. *See Abbott Laboratories* v. *Gardner, supra,* 387 U.S. at **[1086]** 154-6, 87 S.Ct. at 1518-19, 18 L.Ed.2d at 694-5. Since that time several courts have faced this issue and either dismissed pre-enforcement actions in favor of pending enforcement proceedings or transferred pre-enforcement litigation to the district where enforcement proceedings have been brought. *See General Motors Corporation* v. *Volpe,* 321 F.Supp. 1112 (D.Del.1970), *aff'd* 457 F.2d 922 (3d Cir. 1972) (dismissal); *Brown & Williamson Tobacco Company* v. *Engman,* CCH Trade Reg.Rep. ¶ 60,607 (S.D.N.Y. Nov. 5, 1975)(dismissal); *General Electric Company* v. *FTC,* 411 F.Supp. 1004 (N.D.N.Y.1976)(transfer). *Accord, Ford Motor Co.* v. *Coleman,* 402 F.Supp. 475 (D.D.C.1975)(three-judge court). *See also, Floersheim* v. *Engman,* 494 F.2d 949 (D.C. Cir. 1974). Thus ample authority exists for the proposition that the institution of enforcement proceedings within a reasonable time will justify dismissal or transfer of a previously filed pre-enforcement action.

One inquiry that must be addressed is whether the CPR enforcement proceedings already begun or the proceedings to be commenced with respect to '74 LB on or before May 17, 1976,[65] fall within the concept of reasonably prompt institution. *See, e.g., General Motors Corp.* v. *Volpe,* 457 F.2d 922, 923–4; *Ford Motor Company* v. *Coleman, supra,* 402 F.Supp. at 486 and n. 30. The earliest date that enforcement proceedings could have been instituted under the CPR program was February 6, 1976, as no CPR recipients were under any duty to file completed forms prior to that time.[66] The duty to file the '74 LB reports attached 150 days after receipt of the orders which generally occurred in the latter part of August, 1975. Thus, the initial filing deadline was sometime in late January. However, since at least 100 companies had been granted extensions of the filing date or had otherwise indicated an intent to file notwithstanding the passage of the deadline,[67] it is problematic to utilize the original 150 day limit as fixing the point where the Commission was free to commence enforcement proceedings. In fact, Commission counsel represented at oral argument that at least one extension had been granted to April

[64] 28 U.S.C. § 1404(a) provides that:

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[65] At a hearing held on March 31, 1976, the Commission agreed to bring enforcement proceedings against the '74 LB plaintiffs within 45 days.

[66] See MX–108 at 31–2.

[67] FTC Exhibit AA at 2.

30th in the LB program and that some CPR deadlines extended well into April.[68] While the Court recognizes that the Commission is by no means legally obliged to forebear from instituting enforcement action until *all* compliance times for *all* recipients have passed, there are interests that arguably are best served by deferring commencement of such proceedings until the approximate magnitude of non-compliance can be ascertained.

The second factor bearing upon the time frame surrounding Commission commencement of enforcement proceedings is the stipulation developed on January 29, 1976,[69] in which the Commission agreed not to take enforcement action against the plaintiffs prior to the Court ruling on the plaintiffs' preliminary injunction motions or June 11th, whichever first occurred. The motivation behind this stipulation, which was negotiated before the Third Circuit vacated this Court's earlier preliminary injunctions against commencement of enforcement proceedings, was to provide this Court with ample time to decide plaintiffs' motions for preliminary injunctive relief without having to issue a temporary restraining order and undertake the ensuing burden of issuing an extensive opinion within a 10-day time limit. *See* Fed.R.Civ.Proc. 65(b), 52(a). Moreover, to further serve that purpose, at **[1087]** the Court's urging the stipulation of forebearance was extended from whatever hearing date the Court intended to establish until June 11th. In addition, the agreement expressly recognized the Commission's right to apply for relief from its commitment if the ensuing appellate opinion undercut the legal predicate for preliminary injunctive relief in these cases. As a result, following argument on March 31st, I removed this self-imposed bar on the agency's efforts regarding enforcement proceedings.

[23] Given the foregoing any enforcement proceedings commenced to date under the CPR program, or filed for '74 LB within the 45-day deadline set at the March 31st hearing are, or will be, deemed to have been promptly instituted. *See Brown & Williamson* v. *Engman*, CCH Trade Reg.Rep. ¶ 60,607 (S.D.N.Y. Nov. 5, 1975)(enforcement proceeding commenced two months and two days after pre-enforcement challenge filed was considered to be promptly instituted). This conclusion is also strengthened by concessions from plaintiffs' counsel that they had no objection whatsoever to the Commission's taking 45-days to commence enforcement proceedings.[70]

[24] The next inquiry must be whether any interests have been

[68] Docket Item 197, Civil Action No. 75-15 at 177, 183.

[69] Docket Item 192, Civil Action No. 75-15. Although the stipulation was formulated on January 29th, it was not formally executed until the latter part of March because of continuing differences over phrasing of certain passages and the inadvertent misplacing of a handwritten draft.

[70] See Docket Item 197, Civil Action No. 75-15 at 177-83. However, plaintiffs' counsel did vehemently oppose the *institution* of enforcement proceedings as they correctly perceived such action as inimical to their interest of obtaining summary judgment in this forum.

advanced by the plaintiffs that will be sufficiently prejudiced by a transfer or dismissal of these cases to overcome the obvious benefit to the interests of justice inherent in reducing the number of forums that must pass on the same set of issues. Various arguments were advanced by plaintiffs but the Court finds them either to be without merit or supportive of transfer, as opposed to dismissal, of these cases. First, they suggest that an enforcement action, being a summary proceeding designed to allow the Commission to enforce its orders, will be ill-suited to their attacks upon the CPR and LB programs *qua* programs. In addition, they seem to suggest that the summary nature of such a proceeding may result in qualitative differences regarding the claims they have asserted as plaintiffs in this district. This position is essentially meritless because there is really no substantial issue regarding the ability of the plaintiffs to assert as defenses in an enforcement proceeding the issues they have raised here.[71] However, to the extent that an enforcement tribunal *might* seek to focus solely on a particular order or set of orders and in so doing somehow avoid treating the *programs'* legality, this argument seems to militate in support of a transfer of these cases to the enforcement forum as opposed to dismissal. Simply stated, a transfer would enable the plaintiffs to seek consolidation of these cases with the enforcement proceedings and thus eliminate this problem. *See, General Electric Company* v. *FTC, supra,* 411 F.Supp. at 1011. While the same interest could be served by a discretionary non-prejudicial dismissal of these actions, transfer seems to be a more direct device for accomplishing this purpose.

[25] Plaintiffs earlier developed position regarding an inability to join the Comptroller-General as a party to an enforcement proceeding, *supra* at 1080–1081, also suggests transfer as a preferable alternative to dismissal since consolidation would appear to resolve that problem as well. *GE* v. *FTC, supra,* 411 F.Supp. at 1011. Plaintiffs also urge that rather than having this Court stay, dismiss or transfer, the better course would be for the other pre-enforcement forum, the Southern District of New York, or the CPR enforcement forum, the District of Columbia, to stay their proceedings in favor of this Court. Aside from the Commission's argument that this reveals the plaintiffs as mere forum-shoppers, the plaintiffs' suggestion will not eliminate the problem of multiple forums and satisfy the strong policy interests supporting a result that will preclude a proliferation of judicial decision making. *See, GE* v. *FTC, supra,* 411 F.Supp. at 1011. In any event, as be[1088]tween courts, the enforcement forum would appear to have the least justification to issue a stay, especially if the pre-

[71] See discussion and authorities, *supra* at 1079.

enforcement actions were to be transferred there, since, assuming in personam jurisdiction over these plaintiffs, it is the sole forum that can readily adjudicate both plaintiffs' challenges *and* the Commission's demands for enforcement.

[26] Finally, plaintiffs also point to the extensive briefs that have been prepared in-support of the summary judgment motions as a ground for refusing to transfer or dismiss these cases in favor of the enforcement forum. However, whatever limited degree of inconvenience *may* result in this regard, it cannot possibly outweigh the benefit produced by a transfer that satisfies the interests of justice by removing the need for multiple judicial resolution of the same issues. Moreover, it is not at all clear that these particular briefs have been prepared in vain. First, a transfer of these cases will leave both the summary judgment motions and briefs extant. In addition, since the issues raised in this district will be the same as those posed in an enforcement proceeding, the current briefs are adaptable with little more than a change of cover pages to use in that context. Moreover, the plaintiffs' argument is totally undermined because they, along with the Commission, chose for tactical reasons not to adopt a suggestion from the Court that they postpone briefing of any motions until after the Third Circuit had ruled on the appeals in the '73 LB case.

[27] As an alternative, plaintiffs urge that any enforcement proceeding must be asserted as a compulsory counterclaim under Fed.R.Civ.Proc. 13(a) and thus an injunction should issue against the Commission's attempts to bring enforcement actions in a forum other than Delaware. As support for their position they point to *Columbia Plaza Corporation* v. *Security National Bank*, 525 F.2d 620 (D.C.Cir. 1975) where the denial of such an injunction was deemed to be erroneous. However, there is a serious question as to whether *Columbia Plaza* would be followed by the Third Circuit and further, it is readily distinguishable.

There appears to be contrary authority to *Columbia Plaza* in this Circuit. In *General Motors Corporation* v. *Volpe* a similar argument was made by GM as a device to avoid a dismissal of its pre-enforcement challenge in favor of a subsequently filed enforcement proceeding in another forum. *See Id.*, 321 F.Supp. at 1126, n. 24. Although the argument was not directly met in the district court, that court's dismissal, and the Third Circuit's affirmance, both indicated that the reasonably prompt institution of enforcement proceedings justified a refusal to exercise the court's pre-enforcement jurisdiction, a result that is fundamentally inconsistent with the concept of an enforcement proceeding as a compulsory counterclaim to a previously filed pre-enforcement action. *Compare General Motors Corporation* v. *Volpe*, 457

F.2d 922 (3d Cir. 1972) and *General Motors Corporation* v. *Volpe*, 321 F.Supp. 1112 (D.Del.1970) with *Columbia Plaza* v. *Security National Bank, supra*.

Columbia Plaza can be distinguished because neither of the related claims being prosecuted in the two judicial forums present in that case involved the assertion of rights under a special Congressionally designed enforcement scheme which provides the district courts with jurisdiction over suits by the Commission to enforce its orders. 15 U.S.C. § 49. This is especially important because application of *Columbia Plaza* in the instant context would serve to completely eviscerate the Congressionally-mandated enforcement mechanism. Since pre-enforcement challenges, by definition, are filed well before the time that compliance is due and thus prior to the point that an enforcement proceeding could be maintained, a decision treating the latter as a compulsory counterclaim to the former would invariably guarantee not only the complainant's choice of forum but insure that the enforcement action could only be advanced within the scope of the earlier filed action. Moreover, where the challenge is directed, as in this case, to an administrative action of broad applicability, **[1089]** there is a significant probability that pre-enforcement suits would be brought in more than one judicial district. Utilization of the compulsory counterclaim and injunction route in these situations would lead to either the undesirable result of multiple judicial determination of the same issues or to complex transfer or pre-trial consolidation problems-under 28 U.S.C. §§ 1404(a) and 1407. Lastly, the *Columbia Plaza* decision explicitly recognized that the policy underlying Rule 13(a), namely the adjudication of related causes of action in a single forum, is served equally as well by a transfer under section 1404(a) as by an injunction preventing one party from proceeding elsewhere. *Columbia Plaza, supra*, 525 F.2d at 627, 629, n. 65.

[28] Finally, and belatedly[72] plaintiffs urge this Court should not transfer these pre-enforcement actions to the District of Columbia because the Commission will not be able to join all or most of the plaintiffs in CPR and '74 LB enforcement proceedings in the District of Columbia. The underpinning of plaintiffs' position is that the Commission can point to no statutory authority which would authorize extraterritorial service of process in an enforcement action. As a consequence of the Commission's alleged legal disability, plaintiffs urge the Commission cannot obtain in personam jurisdiction over most of them.

At the outset in responding to this argument it must be borne in mind that the amenability of the plaintiffs to service of process in the

[72] On April 21st, plaintiffs filed without leave of Court a "Supplemental Memorandum in Opposition to the Commission's Motions to Stay, Transfer or Dismiss."

District of Columbia enforcement actions is an issue ultimately to be decided by that forum. Therefore, I believe that any direct discussion of the merits of plaintiffs' contentions regarding difficulties in obtaining in personam jurisdiction would be inappropriate and must thus await consideration by the enforcement tribunal. However, some observations are proper with respect to the relationship of this potential issue to the contemplated transfer of these pre-enforcement review actions.

Plaintiffs have submitted no facts to the Court which support their claim that they cannot be considered present in the District of Columbia so as to obviate the asserted need for extraterritorial service. While the record before me does indicate that none of the plaintiffs are incorporated in the District, there is simply nothing of a factual nature which shows, for example, whether any of the plaintiffs maintain offices or conduct business there. As a result of these deficiencies, it is apparent that the legal arguments raised by plaintiffs regarding the statutory limits on service in the District may well be lacking a factual predicate. Moreover, even if plaintiffs are able to develop a factual record in the enforcement forum, their contentions regarding a lack of extraterritorial service under 15 U.S.C. § 49 may prove to be groundless.[73] In addition, defects in in personam jurisdiction may be waived and there is a significant possibility that, assuming *arguendo* plaintiffs are correct, many of the plaintiffs would find it in their interests to waive any objections regarding service of process. For example, should a substantial number of the plaintiffs be amenable to service within the District, the remaining plaintiffs may decide that they should waive objections stemming from a lack of in personam jurisdiction. This is because such a course could be preferable to being relegated to one of several enforcement forums which, without the bulk of the parties before it, would be likely to stay all proceedings pending completion of the District of Columbia enforcement actions. Thus, rather than sit idle during the primary adjudication of issues extremely important to them, the remaining plaintiffs might choose to actively participate in the District of Columbia enforcement proceedings.

Lastly, if the plaintiffs contentions in this regard eventually prove correct, the result [1090] will be a multiplicity of enforcement actions in numerous judicial districts. At that point a referral of the enforcement actions to the Judicial Panel on Multidistrict Litigation would be a virtual certainty in order to achieve a consolidation of all the cases for pretrial purposes. Given that circumstance, the Court is not convinced that the interests of justice will be ill-served by

[73] The Court must re-emphasize that it is not making any comment whatsoever on the actual merits of plaintiffs' claims.

transferring these cases to the enforcement forum since, as a result of a consolidation with the enforcement actions, or by consideration as "tag-along" cases under the Panel's rules, all the actions, both pre-enforcement and enforcement, would thereafter likely move together.

VII. *The Plaintiffs' Motion to Stay Consideration of the Commission's Motion to Dismiss, Stay or Transfer*[74]

The plaintiffs in both '74 LB and CPR countered the Commission's motion to dismiss, stay or transfer on April 21st by filing a motion in this Court requesting it to stay disposition of the aforesaid Commission's requests. The plaintiffs' motion filed in this Court was motivated by the fact that on April 20th they moved before the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407, requesting that Panel to transfer to this Court all pending '74 LB and CPR cases for coordinated and consolidated pretrial proceedings.

Initially, it is noted the plaintiffs' motion to stay can be considered to be in sharp contrast to their position taken at oral argument on March 31st wherein they were opposed to any stay and were pressing for an early decision. The Court can only assume the abrupt change in plaintiffs' tactics is attributable to two recent developments. First, the Commission made a significant contribution toward achieving its avowed goal of presenting all litigation to one tribunal by withdrawing its '73 LB orders against all non-complying corporations. The second significant occurrence was the transfer of the CPR pre-enforcement actions pending in the Southern District of New York to the CPR enforcement forum, the District of Columbia.

[29] The plaintiffs' motion would upon first blush appear to present a potential Catch-22 problem, *viz.*, should this Court await the outcome before the Judicial Panel on Multidistrict Litigation or should that Panel first have the advantage of a ruling which might obviate in whole or in part the necessity for that Panel having to make a ruling in the first instance. In making this determination, one significant observation can be made. The filing of a motion with the Judicial Panel on Multidistrict Litigation in and of itself has no affect on the jurisdiction or power of this Court. *See*, Jud.Pan.Mult.Lit.R. 16, 65 F.R.D. 253, 264–5 (1975).[75] Accordingly, the decision of whether to await further action by the Panel or rule at this point is within the sound discretion of this Court and should be determined on a basis that will serve the interests of justice and notions of judicial economy.

With respect to the CPR litigation, it seems clear that this Court

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[74] For an extended discussion of the Commission's motion to dismiss, stay or transfer see pages 1085–1089.

[75] "The pendency of a motion or order to show cause before the Panel concerning transfer of an action pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court. A transfer shall be effective when the transfer order is filed in the office of the clerk of the district court of the transferee district." 65 F.R.D. 253 at 264–5.

should not stay its hand, but instead transfer these cases to the enforcement forum forthwith. This is because the effect of a transfer by this Court will be to eliminate the multiple district character of the CPR litigation since all pre-enforcement and enforcement actions with respect to the CPR Program will then be pending in the District of Columbia. Since this action may well obviate the need for consideration of plaintiffs' motion by the Panel, the interests of justice are best served by denying the plaintiffs' motion to stay with respect to the CPR litigation.

[1091] The situation surrounding the LB '74 cases is somewhat more complex as pre-enforcement actions are currently pending in two districts with the imminent likelihood of enforcement proceedings being commenced in a third district. Obviously, action by this Court alone cannot by itself resolve the issue currently before the Panel on Multidistrict Litigation. As a result a stay of the '74 LB cases pending disposition by the Panel might well be appropriate. However, as a practical matter this course if not a viable option. Simply stated, it is impossible to both transfer the CPR cases immediately and yet stay the Court's hand with respect to transferring '74 LB. Not only did some[76] of the plaintiffs raise LB and CPR claims in the same actions, but they also plead causes of action as to both programs in a hopelessly intermingled manner. As a result, the Court is faced with a choice. Should it allow itself to be controlled by the vagaries of plaintiffs' pleading styles and stay both programs, notwithstanding the fact that immediate transfer of the CPR cases would best serve the interests of justice? Or, should it transfer all the cases at this point, subject only to a condition that the Commission institute enforcement proceedings with respect to '74 LB prior to May 17th in the District of Columbia, notwithstanding the potentially limited efficacy of that action as a means of obviating action by the Panel? Given these options, neither of which is wholly perfect, the Court must conclude that the better course is the latter since it will serve the interests of justice in larger measure, especially in the CPR context, by reducing the multiplicity of jurisdictions that must pass on the same issues. Accordingly, all CPR and '74 LB cases pending in this district will be transferred to the District of Columbia subject to the condition that the FTC commence

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[76] Civil Action Nos. 75-56, 76-19, 76-20 and 76-22. The plaintiffs' pleading choice was by no means foreordained since at least one party chose to file two separate civil actions challenging the LB and CPR programs. See Civil Action Nos. 76-56, 76-60.

One can argue that *all* the '74 LB plaintiffs should not be penalized by virtue of the pleading styles of a minority of the plaintiffs. Thus, one option available to the Court is the issuance of a stay pending institution of enforcement proceedings or a decision by the Panel in all LB cases not commingled with CPR counts. However, this course would have the effect of fragmentizing the LB cases between two districts. Since that result is fundamentally at odds with the purpose of a transfer in this context, namely reducing the multiplicity of courts that must pass on the same issues, the LB cases must be treated together.

enforcement proceedings there against the non-complying recipients of '74 Form LB by May 17, 1976.

RETAIL CREDIT CO. v. FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 75–0895. F.T.C. Docket No. 8920.

(United States District Court, District of Columbia, May 11, 1976)

On motion for summary judgment, court held that in light of *Ash Grove Cement Co.* v. *F.T.C.*, 511 F.2d 815 (D.C. Cir. 1975), IX S&D 1321, it was bound to deny discovery of F.T.C. minutes consisting of staff directives, opinions and recommendations of commissioners; that assignment memoranda were not part of the "deliberative process" of commissioners or staff members, and that personal or financial information that would cause embarrassment if disclosed was exempt from discovery. 9 Summary judgment in favor of defendants granted.

Kenneth E. Krosin, of *Howrey & Simon*, Washington, D.C., for plaintiff.

Ann S. Duross, Asst. U.S. Atty., Washington, D.C., for defendants.

Before JONES, *Chief Judge*.

MEMORANDUM AND ORDER

Presently before the Court is defendants' motion for summary judgment. Several interim orders have been entered by the Court, which in part have upheld defendants' action in withholding certain documents, in part have ordered disclosure of other documents, and in part have required further, more complete indexing of certain documents under *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973). The Court has earlier reviewed a representative sampling of the documents, which was submitted for *in camera* inspection pursuant to Court order, has reviewed the supplemental index submitted by defendants pursuant to Court order, and has considered all the arguments made by both parties. Defendants' motion for summary judgment is now ripe for decision.

The scope of the present Memorandum and Order is a narrow one, several of the issues having been disposed of in the Court's Memorandum and Order of February 2, 1976, or mooted by defendants' release of documents or portions of documents previously withheld. Thus, all the documents indexed in Categories I, II, and VII have been released, and the documents in Categories IV, VI, VIII, X, XI, XII, XIII, XIV, and XVII have been released or their nondisclosure has been upheld by the Court's February 2, 1976 Memorandum and Order. The documents

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶60,909 at 68,968 (1976-1 Trade Cases).

remaining in issue are the following: Category III, all items; Category V, Item 1(c) and similar items,[1] Category IX, Items 2(A)—2(L); Category XV, Items 2 and 10; Category XVI, Items 2 and 5-9. Each will be discussed *seriatim*.

Category III

Category III consists of Commission minutes which can best be described as an intermixture of simple directives to the staff concerning actions to be taken by the staff in conjunction with the credit industry investigation and opinions or recommendations of various Commissioners or staff members concerning action to be taken. *In camera* review of certain of the minutes has disclosed that the staff directives are easily segregable from the opinion or recommendation portions of the minutes, and this Court would feel compelled to disclose those directives if it were not for the opinion of the Court of Appeals in *Ash Grove Cement Co.* v. *FTC*, 511 F. 2d 815 (D. C. Cir. 1975). In that case, however, Commission minutes identical in substance to the minutes presented here were withheld from disclosure, and the Court is of course bound by that decision.[2] The documents in Category III, therefore, were properly withheld from disclosure under exemption 5.

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[1] In the February 2, 1976 Memorandum and Order, Item 1(c) was ordered disclosed. Defendants have asked the Court to reconsider this order.

[2] The decision in *Ash Grove Cement Co.* is difficult to reconcile with the Court of Appeals opinion in *Vaughn* v. *Rosen*, 523 F. 2d 1136 (D. C. Cir. 1975), which was decided seven months after *Ash Grove Cement Co.* In *Vaughn*, the court discussed at length the type of material which is protected by exemption 5. In the words of the court, to be exempt "the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters," and must be "a part of the agency give-and-take—of the deliberative process—by which the decision itself is made." *Id.* at 1144. To label the staff directives at issue here as part of the deliberative process is to expand that term beyond manageable proportions. There are no opinions or recommendations in the directives which cannot be easily segregated, and it cannot reasonably be said that these directives disclose circumstantially the opinions, analysis or thought processes of agency personnel. See *Washington Research Project, Inc.* v. *Department of HEW*, 504 F. 2d 238, 250–51 (D. C. Cir. 1974). It might be argued that a Commission directive to the staff to consolidate two investigations or to submit a report on a certain issue would somehow disclose Commission concern over that issue, thus violating the secrecy of the deliberative process. But *every* action by the Commission in some way discloses the direction of its thought and to construe exemption 5 to include such material not only violates the established rule that the exemption should be narrowly construed, but would also substantially end disclosure of most agency material.

When this Court upheld nondisclosure of other documents on the basis of exemption 5 in its February 2, 1976 Memorandum and Order, it did so because the material either contained opinions or recommendations for proposed future action (for example, Categories X-XIV) or was so directly a part of the deliberative thought process of a particular person (such as staff notes, rough drafts, or marginal notations) as to legitimately fall within the policy of exemption 5. It must be remembered that exemption 5 protects from disclosure material which is privileged in the civil discovery context. See *NLRB* v. *Sears Roebuck & Co.*, 421 U. S. 132, 149 (1975). Judge Wilkey has aptly described the privilege normally invoked by the government in exemption 5 cases as the "common sense-common law privilege, *i. e.*, the recognition that the Government cannot operate in a fish bowl." *Vaughn* v. *Rosen*, *supra* at 1146. The Court must, within the context of each case, determine whether publication would inhibit "the frank discussion of legal and policy matters" within the agency or would otherwise cause "injury to the quality of agency decisions." *Sears*, *supra* at 150-51. Thus, seldom will agency material that does not include opinions, recommendations, or deliberative ruminations about certain issues find protection within the "common sense-common law privilege" recognized by exemption 5. It is this Court's view that that privilege cannot reasonably be construed to exempt Commission directives to its staff which are more aptly described as administrative rather than deliberative actions. Indeed, such actions could arguably be characterized as final agency action by the Commission concerning administrative details, which would be subject to disclosure under section (a)(2). See *Sears*, *supra*. The position taken by the Court of Appeals in *Ash Grove Cement Co.*, however, factually controls the instant case and although the subsequent decision in *Vaughn* v. *Rosen* would seem to argue strongly in favor of disclosure, this Court feels bound to follow the decision in the prior case.

Category V

The vast majority of the documents in this Category have been found to be properly withheld from disclosure under exemption 5 in that they contain the recommendations or opinions of individual Commissioners or the staff. See Memorandum and Order of February 2, 1976, at 6. The Court ordered Item 1(c), which had been submitted for *in camera* inspection, disclosed in that there were no opinions or recommendations expressed in it. The Court also directed defendants to review all other documents within Category V to insure that no other documents similar to Item 1(c) existed, and if they did, to disclose them along with Item 1(c).

The defendants have requested the Court to reconsider its decision in this regard. As described by defendants,

> Item 1(c) and the slips similar in content are assignment memoranda of the Commission. They indicate the individual Commissioner to whom a matter is being assigned for his or her consideration and presentation to the Commission.

Def. Response to the Court's Memorandum and Order of February 2, 1976, at 9. They argue that these assignments "constitute part of the deliberative process," "would prematurely expose the decision making procedures of the Commission," and could subject individual Commissioners to "outside lobbying efforts." *Id.* at 10. Nondisclosure, according to defendants, is necessary "to insure the integrity of the deliberative process." *Id.*

Defendants once again seek to expand the definition of "deliberative process" beyond all manageable proportions. Simple assignment of a case to a particular Commissioner does not involve recommendations or opinions on legal or policy matters, nor does it represent the thought processes of Commissioners or staff members. For the public to know which Commissioner is assigned to a particular case would no more injure the quality of agency decisions than for the public to know that the Commission is investigating a particular matter. If an individual Commissioner is susceptible to outside influence designed to affect that Commissioner's attitude toward a particular case—an assumption this Court refuses to make—that susceptibility will exist regardless of whether the public knows that that particular Commissioner is directly in charge of a certain case. This Court will not expand the concept of "deliberative process" to include all documents which are generated in the course of agency decision making. Unless it includes opinions or recommendations, or directly reflects the thought processes of particular staff personnel or Commissioners, it cannot be brought within the protection of exemption 5. Accordingly, the Court's order of

February 2, 1976, regarding Category V remains in full force and effect and must be complied with promptly.[3]

Category IX

In its February 2, 1976 Memorandum and Order, this Court noted that certain of the items in Section 1 did not reveal personal or financial information of the type which, if related to a particular person, would cause such embarrassment as to preclude disclosure of the person's identity under exemption 7(C). To insure that all similar non-exempt documents were disclosed in full, the Court ordered defendants to reindex all documents both in Section 1 and Section 2. In response, defendants released the items in Section 1 and reindexed the documents in Section 2 to more adequately describe the documents. Review of the new descriptions demonstrates that the items in Section 2 are similar in content to those in Section 3, which the Court earlier held exempt under exemption 7(C). See Memorandum and Order of February 2, 1976, at 10. Accordingly, the deletions in these documents were properly withheld from disclosure.

Categories XV and XVI

The documents remaining at issue in these two categories have been released in part. The Supplementary Index describes in adequate detail the deleted portions so that this Court can make a reasoned decision about the applicability of exemption 5 to each portion.[4] Plaintiffs do not seem to dispute that these deletions, if accurately described, would fall within exemption 5. See Pl's Reply to Def. Responses to the Court's Orders, at 3. The descriptions in the Supplementary Index confirm this view, and the Court finds that such deletions, assuming they are accurately described, would fall within the policy of exemption 5.

Plaintiff requests the Court to conduct a second *in camera* inspection to insure the accuracy of the Supplementary Index. This the Court need not and will not do. If *in camera* inspection prior to the February 2, 1976 order had disclosed substantial discrepancies between the descriptions in the Index and the documents withheld and examined, then further *in camera* inspection would be justified here, and the Court would not hesitate to undertake such a task. The first *in camera* inspection disclosed only minor discrepancies, however, which

[3] The Court's disposition of Item 1(c) is admittedly somewhat inconsistent with its disposition of Commission minutes in Category III. Not being bound by the decision in *Ash Grove Cement Co.* with regard to transmittal slips, however, ordering disclosure of Item 1(c) is consonant with the policy of exemption 5 as outlined in *Vaughn* v. *Rosen*, *supra*.

[4] Item 2 in Category XVI was withheld (in part) pursuant to exemption 4. In accordance with the Court of Appeals decision in *Pacific Architects & Engineers* v. *Renegotiation Board*, 505 F. 2d 383 (D. C. Cir. 1974), defendants were ordered to submit further factual and evidentiary material to support the claim of exemption 4. As with item 3 in Category VIII, the Court finds the information submitted sufficient to support the claim of exemption 4.

are easily attributable to inadvertent mistake rather than conscious mischaracterization. The Court may therefore accept the descriptions of documents in the Supplementary Index as accurate. See *Ash Grove Cement Co., supra* at 817-18. Accordingly, the Court finds that the deletions in Categories XV and XVI were properly made pursuant to exemption 5.

Conclusion

This concludes the determination of the propriety of the agency's actions in withholding some 3,000 pages of documents from plaintiff and the sufficiency of the Index submitted to this Court under the procedures outlined in *Vaughn* v. *Rosen* and its progeny. Many of the pages have been released in the course of this litigation, the remainder have been either ordered disclosed or found to be exempt from disclosure. The Index and Supplementary Index, while not always a picture of clarity, adequately suffice to protect the rights of plaintiff under *Vaughn* v. *Rosen* and to permit the Court to make a reasoned decision. In light of this conclusion, plaintiff's arguments that adversary agency counsel should not be permitted to participate in the review of documents requested to be disclosed and that the defendants did not promptly comply with plaintiff's request need not be reached. Accordingly, summary judgment will be entered in favor of defendants.[5]

In light of the foregoing, it is this 10th day of May, 1976,

Ordered that defendants' motion for summary judgment be and the same hereby is granted.

[5] The Court expresses no opinion concerning the propriety of attorney's fees in this action, if plaintiff determines to seek such an award. Entry of summary judgment on behalf of defendants, however, should not be construed to automatically mean defendants alone prevailed.

KENNECOTT COPPER CORPORATION v. FEDERAL TRADE COMMISSION*

No. 75–1699. F.T.C. Docket No. 8765.

(United States Court of Appeals, Tenth Circuit, May 21, 1976)

1. ABSENT MODIFICATION OF F.T.C.'S ORDER, COURT HAD NO JURISDICTIONAL AUTHORITY TO ENTERTAIN MOTION OR TAKE REQUESTED ACTION, AND WHERE BASIS FOR MOTION HAD NO FACTUAL FOUNDATION, COURT LACKED INHERENT EQUITABLE AUTHORITY TO REVIEW ENFORCEMENT DECREE.

   Court of Appeals lacked jurisdiction to entertain copper producer's motion that the court modify its prior affirmance on order of enforcement of Federal Trade Commission order requiring the copper producer to divest itself of coal mining company, absent modification of FTC's order; court had no Clayton Act jurisdiction to take the requested action and had no inherent equitable power to review the enforcement order or decree, especially since the proffered basis for such action, i.e., change in circumstances, had no factual basis.

2. ONLY WHERE A COURT ORDER IS AMBIGUOUS IS CLARIFICATION OF SUCH ORDER APPROPRIATE.

   The court has inherent authority to construe and clarify its order entered following review of agency action; however, such clarification is appropriate only if the order is ambiguous or unclear.

3. STATUTE AUTHORIZES THE EXTENT OF COURT'S JURISDICTION TO REVIEW ADMINISTRATIVE ACTIONS.

   Court's jurisdiction with respect to review of administrative agency action extends as far and no further than the statute authorizes.

(Syllabus, with substituted captions, taken from 542 F.2d 801.)

On appeal for modification of its enforcement order, court held that it had no inherent equitable authority to review such order, particularly where asserted basis for the request had no factual foundation; and that where F.T.C. order had not been modified, court lacked jurisdictional authority to entertain motion, or take the requested action.

Motion denied.

BARRETT, *Circuit Judge*, filed dissenting opinion.

William Piel, Jr., Sullivan & Cromwell, New York City, and *Donald C. McKinlay* of *Holme, Roberts & Owen*, Denver, Colo. (*Arthur H. Dean, Roy H. Steyer* and *John L. Warden* of *Sullivan & Cromwell*, New York City, *William Simon, J. Wallace Adair, Hohn Bodner, Jr.*, and *Francis A. O'Brien* of *Howrey & Simon*, Washington, D.C., on the brief), for petitioner.

W. Baldwin Ogden, Atty., F.T.C., Washington, D.C. (*Robert J. Lewis*,

* Reported in 542 F.2d 801 (1976). For case before the Commission, see 78 F.T.C. 744.

Gen. Counsel, *Gerald Harwood*, Asst. Gen. Counsel, and *Robert E. Duncan*, Atty., F.T.C., Washington, D.C., on the brief), for respondent.

Before McWILLIAMS, BARRETT AND DOYLE, *Circuit Judges*.

WILLIAM E. DOYLE, *Circuit Judge*:

[802] The cause is before us on this occasion on the motion of Kennecott seeking to persuade this court to modify its affirmance and order of enforcement of the FTC order requiring Kennecott to divest itself of the Peabody Coal Company which it had acquired.

It was on September 15, 1972, that we approved the order of the FTC requiring Kennecott Copper Company to divest itself of the Peabody Coal Company. On that occasion we upheld the Commission's determination that the effect of the acquisition may be to substantially lessen competition or tend to create a monopoly. The FTC had issued its decision on May 13, 1971. In our opinion, *Kennecott Copper Corporation* v. *FTC*, 467 F.2d 67 (10th Cir. 1972), we noted that the pivotal question "in the case was whether prior to the merger Kennecott was a recognized potential entrant into the coal producing business and whether the elimination of Kennecott (as such a potential entrant) by its purchase of Peabody may have substantially lessened competition or tended to create a monopoly." 467 F.2d at 69.

On October 13, 1972, Kennecott's petition for rehearing was denied en banc by this court. On April 1, 1974, the Supreme Court denied Kennecott's petition for certiorari, 416 U.S. 909, 94 S.Ct. 1617, 40 L.Ed.2d 114. On April 22, 1974, the Court denied a petition for rehearing, 416 U.S. 963, 94 S.Ct. 1983, 40 L.Ed.2d 314. As of that latter date, then, the order became final pursuant to the Clayton Act, 15 U.S.C. Section 21(g)(3). On April 1, 1974, the Commission extended until October 1, 1975, the time which governed the filing of a final order by Kennecott detailing its plans for complying with the order of divestiture. On motion of Kennecott, a stay was granted until October 14, 1975.

Kennecott has refused to accept the finality of the order. This is apparent from its numerous efforts to persuade the FTC to reopen the case and by its persistence in seeking to persuade this court that it should take some action in its behalf.

15 U.S.C. Section 21(c) provides that the judgment affirming the motion "shall be final, except that the same shall be subject to review by the Supreme Court on certiorari. * * *" Certiorari has been sought and denied. Hence under 15 U.S.C. Section 21(g)(3), the order is once again final. Kennecott would, however, have us hold that the review proceedings here are equitable and that we have a continuing jurisdiction to review our order of affirmance. Therefore, according to its further arguments, inasmuch as the economic conditions have

changed drastically since entry of our order and judgment, we are obligated to reopen and reconsider the case.

[1] The facts which they point to showing a change of condition are the fuel shortage plus the alleged fact that both the FTC and this court in affirming the Trade Commission were wrong in projections made that there would be a trend toward concentration of the coal industry. They also rely on the argument that the FTC was wrong in its prediction that there was a shortage of strong entrants into coal production and in projecting that Peabody would become an entrenched dominant firm. In essence, then, they contend that subsequent developments have proven that it was palpably unjust to compel Kennecott to divest itself [803] of Peabody Company, so they seek nothing less than attempted retrial or rehearing of the issues. We must reject all of these contentions.

In ordering that the FTC's order be enforced, we considered fully FTC's argument that Kennecott was the most likely entrant into the coal business and that the coal industry was tending toward concentration. We upheld the FTC's finding that Kennecott's acquisition of Peabody eliminated a substantial competitor and thereby substantially lessened competition in the industry. This was the result of a careful analysis of the issues of fact and law. For us to now deny enforcement of the provisions of the order requiring divestiture or, in the alternative, to require the Commission to reopen would not only be action outside the law since our judgment was final, it would also lack justification from a purely factual standpoint. We do not agree with Kennecott that there has been change of circumstances since 1972 which makes divestiture unjust.

[2] It is true that a court has inherent authority to construe and clarify its order entered following review of agency action, but such clarification could be appropriate only if the order were ambiguous or unclear. *Floersheim* v. *Engman*, 161 U.S.App. D.C. 30, 494 F.2d 949 (1973). *See also Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 65 S.Ct. 478, 89 L.Ed. 661 (1945). Kennecott does not wish for us to clarify the judgment. It is interested in obtaining a substantial modification of it.

The case of *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1966), is relied on by Kennecott. There the Supreme Court's holding was that where the FTC had issued a complaint pursuant to Section 7 of the Clayton Act against a prospective merger, the Commission had standing to seek a preliminary injunction restraining the merger pending the outcome of the action. In its opinion the Court stated that there was no basis for precluding the agency from asking the Court of Appeals to grant preliminary equitable relief in order to protect the agency's jurisdiction, but this case is far different from the problem at bar. It is one thing to invoke

the court's authority to facilitate the agency's performance of its duties; it is quite another thing to ask us to go outside the authority granted to us so as to interfere with or overturn the agency's decision. Here the FTC has completed its review and has issued its order. To interfere with this would in fact and in law constitute not a protection of agency jurisdiction, but infringement of its jurisdiction.

The applicable statute, 15 U.S.C Section 21(c), spells out when the order shall be final. The FTC Act, 15 U.S.C. Section 45, is substantially the same. From a reading of these statutes, the FTC only would have authority to reopen a case when changes in the facts or the law or the public interest necessitate a modification of the order. *See* H.R.Rep.No.580, 86th Cong., 1st Sess., U.S. Code Cong. & Admin.News 1959, p. 1804. The House Report cited *American Chain and Cable Co., Inc.* v. *FTC*, 142 F.2d 909 (4th Cir. 1944).

In *American Chain and Cable* the Commission had refused to review an order that had been reviewed by the court. It said that it did not have the power to do so at that stage. In rejecting this the Court of Appeals carefully pointed out that its decision depends on the agency's order and is not the product of the underlying condition. We do not consider the fact that the case arose under the FTC Act rather than the Clayton Act makes the case less authoritative since the review provisions of the Clayton Act follow those found in the FTC Act.

Since, then, there has been no modification of the FTC's order of divestiture, we see no jurisdictional basis for our modifying the decree. If we were to do so we would be usurping the function which Congress has granted to the Commission.

[3] The position we take, therefore, is consistent with the general principle that the court's jurisdiction with respect to review of administrative agency action extends as far and no further than the statute authorizes. *SEC* v. *Louisiana Public Serv*[804]*ice Commission*, 353 U.S. 368, 77 S.Ct. 855, 1 L.Ed.2d 897 (1957); *Martin Marietta Corporation* v. *FTC*, 376 F.2d 430 (7th Cir.), *cert. denied*, 389 U.S. 923, 88 S.Ct. 237, 19 L.Ed.2d 265 (1967). As was said by the Supreme Court in *American Federation of Labor* v. *NLRB*, 308 U.S. 401, 404, 60 S.Ct. 300, 302, 84 L.Ed. 347 (1940), the jurisdiction of federal courts to review agency action "* * * is specially conferred by legislation relating specifically to the determinations of such agencies made subject to review, and prescribing the manner and extent of the review."

We deem it significant that the Clayton Act, 15 U.S.C. Section 21(b), provides that in the event of a change of facts or law or if the public interest shall so require, the Commission may reopen a case and modify an order. Consistent with this are the holdings that judicial review is available only where the FTC has decided to reopen the case. *See* 15 U.S.C. Section 21(b); *Martin Marietta Corporation* v. *FTC*, 376 F.2d

430 (7th Cir.), *cert. denied*, 389 U.S. 923, 88 S.Ct. 237, 19 L.Ed.2d 265 (1967); *Rettinger* v. *FTC*, 392 F.2d 454 (2d Cir. 1968); *see also SEC* v. *Louisiana Public Service Commission*, 353 U.S. 368, 77 S.Ct. 855, 1 L.Ed.2d 897 (1957).

We recognize that Kennecott has not specifically requested that we review the denial by the FTC of its request made to that agency to reopen. Yet, in essence, that is what Kennecott is seeking. If we were at this stage to revise our 1972 decree by denying enforcement of the divestiture order, this would result in the Commission's having to conduct further proceedings or at least to modify its order. To do so it would have to reopen the case. This would be contrary to the letter and the spirit of the law.

Finally, from the standpoint of policy, all litigation including administrative adjudications must have some finality. To accept Kennecott's argument would be tantamount to allowing litigants to thwart enforcement by protracted court proceedings.

We conclude that this court lacks jurisdiction to entertain the Kennecott motion; that we have not been granted jurisdiction under the Clayton Act; and that we do not have inherent equitable powers to review the 1972 enforcement order or decree.

Kennecott's motion for modification of the court's decree enforcing the order of the FTC is, therefore, denied.

BARRETT, *Circuit Judge* (dissenting):

I respectfully dissent.

I agree that Kennecott is seeking to be reheard on the same *issues* which were involved in the original divestiture proceeding, but I do not agree that Kennecott has failed to set forth facts strongly indicating that the projections and assumptions leading to the conclusions relied upon by the FTC in 1972 for the "meat" of its divestiture order—which this Court then properly held to be predicated upon substantial evidence—have simply not come to pass. There is indication that the 1972 FTC good faith analysis is not now valid. That, however, is a determination to be made by the FTC initially and not by this Court.

I agree with FTC Commissioners Nye and Thompson who dissented in the 3 to 2 vote cast upon Kennecott's July 7, 1975 petition to reopen the administrative proceedings. That petition was based upon the changes in the structure of the coal industry which have occurred since the FTC filed its original order about five years ago. Commissioners Nye and Thompson observed that because of the dramatic need for coal which has become of paramount national concern, generating massive and aggressive undertakings by major companies to enter the coal acquisition-exploration fields, that there is no substantial public

interest to weigh against the benefit to be derived from examining the evidence relative to present developments in the coal industry.

I would hold that the FTC order of July 22, 1975, denying Kennecott's "Petition to Reopen the Proceeding" constitutes an abuse of discretion requiring that this Court, on the record before us, order the Commission to undertake full and complete administrative proceedings in accordance [805] with said petition and render findings and conclusions for our review, if presented. Such an order is specifically authorized under the terms and provisions of 5 U.S.C. § 706.

In *Cappardova* v. *Celebrezze*, 356 F.2d 1 (2nd Cir. 1966), Judge Friendly held that an agency decision not to reopen what had become a final and binding determination was reviewable and that agency discretion with regard to reopening [*see* 5 U.S.C. § 701(a)] did not immunize such a decision from any judicial examination to determine whether the administrative decision constitutes an abuse of discretion under § 10(e) of the APA, 5 U.S.C. § 706, *supra*. *See also Langford* v. *Flemming*, 276 F.2d 215 (5th Cir. 1960); *Eck Miller Transfer Co.* v. *United States*, 143 F.Supp. 409 (D.C.Ky.1956); *McMahon* v. *Ewing*, 113 F.Supp. 95 (D.C.N. Y.1953).

I agree that there is no jurisdictional basis for this Court to modify our decree in *Kennecott Copper Corporation* v. FTC, 467 F.2d 67 (10th Cir. 1972). I would, however, direct the FTC to reopen the case for full and complete administrative proceedings upon Kennecott's petition so as to determine whether there have been sufficient changes in the structure of the coal industry and the public interest to be served which may justify the alteration, modification or setting aside of its prior final divestiture order on the basis of changed conditions of fact or law or both. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); Section 3.72(b)(2) of the FTC's Procedures and Rules of Practice; Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b); Davis, Administrative Law Treatise, Vol. 4. §§28.08, 28.21.

FEDERAL TRADE COMMISSION v. DANIEL FIRESTONE*

Civ. A. No. C76–130. F.T.C. File No. 99–270.

(United States District Court, Northern District of Ohio, Eastern Division, June 4, 1976)

On petition for enforcement of subpoena duces tecum, court held that in the wake of the 1973 Amendment to the Federal Trade Commission Act modifying the Attorney General's exclusive authority to enforce subpoenas issued by the F.T.C., defendant's argument that the F.T.C. was constrained to seek judicial enforcement of its subpoena absent application of Attorney General was invalid; that enforcement of a subpoena is properly a summary judgment; and that the information and documents sought by the Commission were neither burdensome nor oppressive, but rather highly relevant to the investigation.

Enforcement of the subpoena duces tecum so ordered.

Before ROBERT D. KRUPANSKY, *District Judge*.

ORDER

This is a proceeding initiated by the Federal Trade Commission (FTC or Commission) pursuant to Section 9 of the Federal Trade Commission Act, as amended, 15 U.S.C. §49 (the Act), to enforce an administrative subpoena duces tecum issued on July 30, 1975, in furtherance of an investigation by the FTC of respondent's compliance with Section 5 of the Act, 15 U.S.C. §45.

On August 21, 1975, respondent moved to quash said subpoena. In response thereto, the Commission, granting in part and denying in part respondent's motion, modified several of the subpoena's specifications. Subsequent to a hearing on October 29, 1975, respondent complied with all specifications but 3(e) and 8, which seek information relative to respondent's "account executives" and distributors, respectively.

Pursuant to the FTC's Petition to Enforce the Subpoena, this Court issued an Order to Show Cause on February 12, 1976. A hearing on the Show Cause Order was held on June 2, 1976, wherein respondent Daniel Firestone, President of Firestone Photographs, Inc., contended that the FTC requests were burdensome, oppressive and overbroad, as well as infringing upon respondent Firestone's Fifth Amendment privilege against self-incrimination. Respondent further moved to dismiss the petition to enforce the subpoena and to vacate the Order to Show Cause on grounds that the Commission is without authority to enforce its own subpoena, and further such enforcement proceeding is properly instituted only by Complaint.

The Court is initially constrained to conclude that the Commission

* Not otherwise reported.

has the authority to seek judicial enforcement of its subpoenas absent application by the Attorney General. Such conclusion is predicated upon two factors.

Section 49 of Title 15, United States Code, provides, in pertinent part:

> For the purposes of sections 41 to 46 and 47 to 58 of this title the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.
>
> Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.
>
> Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.
>
> Upon the application of the Attorney General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person, partnership, or corporation to comply with the provisions of sections 41 to 46 and 47 to 58 of this title or any order of the Commission made in pursuance thereof.

Paragraphs two and three extend to the Commission the authority to judicially enforce a subpoena, whereas paragraph four is applicable to the enforcement of an FTC order. *Federal Trade Comm'n* v. *Browning*, 435 F.2d 96, 100 n.9 (D.C. Cir. 1970); *Federal Trade Comm'n* v. *Continental Can Co., Inc.*, 267 F. Supp. 713 (S.D. N.Y. 1967); *Federal Trade Comm'n* v. *Waltham Watch Co.*, 169 F. Supp. 614 (S.D. N.Y. 1959). *Cf. Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 200 n. 24 (1946); *Federal Trade Comm'n* v. *Tuttle*, 244 F.2d 605, 608 (2nd Cir.), *cert. denied*, 354 U.S. 925 (1957); *Federal Trade Comm'n* v. *MacArthur*, Trade Cas. ¶60,802 (7th Cir. 1976). *Contra, Federal Trade Comm'n* v. *Guignon*, 390 F.2d 323 (8th Cir. 1968). Insofar as the *Guignon, supra*, decision is predicated upon an analysis of 28 U.S.C. §516, granting the Attorney General supervision of litigation wherein a federal agency is a party, said decision is presently of dubious vitality in wake of the 1973 amendment of 15 U.S.C. §56 modifying the

Attorney General's exclusive authority in this area in favor of the Commission. 15 U.S.C. §56(2)(D).

The second factor in the Court's denial of respondent's Motion to Dismiss is the federal regulation promulgated pursuant to the Act, 16 C.F.R. §2.13, which provides:

> In cases of failure to comply with Commission investigational processes, appropriate action may be initiated by the Commission or the Attorney General, including actions for *enforcement*, forfeiture, or penalties or criminal actions. (Emphasis added).

Such regulation has the force and effect of law. *Rosen* v. *United States*, 245 U.S. 467 (1918); *Hill* v. *Federal Trade Comm'n*, 124 F.2d 104 (5th Cir. 1942); *Brown* v. *Bates*, 363 F. Supp. 897 (N.D. Ohio 1973).

Respondent's second ground for dismissal is also without merit. Enforcement of a subpoena is properly a summary proceeding, initiated by a Petition rather than a Complaint. *Federal Trade Comm'n* v. *Sherry*, CCH 1969 Trade Cas. ¶72,906 (D.D.C. 1969). *See also*, *Federal Trade Comm'n* v. *Scientific Living, Inc.*, 150 F. Supp. 495 (M.D. Pa. 1957), *aff'd*, 254 F.2d 598 (3rd Cir.), *cert. denied*, 358 U.S. 867 (1958).

It therefore appearing that the instant enforcement proceeding was properly initiated by a proper party, respondent's Motion is hereby denied.

As for respondent Firestone's attempt to invoke the Fifth Amendment privilege against self-incrimination, the Court directs his attention to *Bellis* v. *United States*, 417 U.S. 85, 88 (1974), wherein the Supreme Court stated:

> [A]n equally long line of cases has established that an individual cannot rely on the privilege [against self-incrimination] to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally.

See also, *United States* v. *Peter*, 479 F.2d 147 (6th Cir. 1973).

Finally, the Court, applying the broad guidelines enunciated in *United States* v. *Morton Salt*, 338 U.S. 632, 652 (1950), to ascertain the proper exercise of FTC subpoena power, concludes that the production of the information and documents sought by the Commission herein are neither burdensome nor oppressive, but rather are highly relevant to the instant investigation.

Accordingly, it is ORDERED that respondent Daniel Firestone, President, Firestone Photographs, Inc., be and hereby is commanded to appear before such examiner of the Federal Trade Commission, as it may duly designate, at the Commission's offices, at Room 1339, Federal Office Building, 1240 East Ninth Street, Cleveland, Ohio on or before July 4, 1976, and then there to appear and produce documentary evidence in accordance with specifications 3(c) and 8 of the Federal

Trade Commission subpoena dated July 30, 1975, as modified. Failure to comply with the terms and conditions of this Order shall constitute a contempt of this Court and respondent shall thereupon be forthwith remanded to the custody of the U. S. Marshal to be incarcerated until absolved of the contempt perpetrated by violating this Court's Order herein.

IT IS SO ORDERED.

UNITED STATES OF AMERICA v. O.K. TIRE & RUBBER CO.*

Civ. A. No. 1–74–152. F.T.C. Docket No. 8571.

(United States District Court, District of Idaho, June 14, 1976)

On a discovery motion for documents to be used as a defense in a civil penalties suit, court granted defendant access to certain Antitrust Division data relating to a monopoly case against tire industry leaders and to F.T.C proceedings involving automotive products, but held that the firm was not entitled to discovery of documents constituting work product of Government attorneys, nor was work product privilege affected by the fact that the monopoly case was over.

Stephen R. McSpadden, Antitrust Div., Dept. of Justice, *Paul L. Westberg*, Asst. U.S. Atty., Boise, Ida., for plaintiff.

Ray Bolze and *William J. Hunter, Jr.*, of *Howrey & Simon*, Washington, D.C., for defendant.

Before ANDERSON, *District Judge*.

ORDER

On October 4, 1974, defendant filed a request for production of documents. Request #28 sought the following:

All documents relating to sales volumes, and percentage of market, of various tire brands or manufacturers for any time since 1962.

Request #29 sought the following:

All documents relating to any possible public injury caused by these alleged violations, or any restraint of trade or lessening of competition resulting therefrom.

Defendant filed, on January 2, 1975, a motion to compel the production of documents. Defendant's brief in support of its motion states that one issue involved in this lawsuit, even if it is shown that defendant violated the consent order, is whether there was any public harm. Defendant intends to prove that the tire industry is dominated by four to five major brand companies and that the only way O. K. Tire can remain in business is to insist that the O. K. dealers aggressively stock and sell O. K.'s products. Defendant states:

In this regard, we have sought information from the FTC files as to national market share information in the tire industry of all the various companies, including in particular the major brand companies. This data will show the minute position in this industry occupied by O. K. Tire and the lack of any public injury from these alleged acts of defendant. It would be very difficult for defendant to collect this information without

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶60,984 at 69,356 [1976-2 Trade Cases]. For case before the Commission, see 65 F.T.C. 1091.

nationwide broad-scale discovery and this is unwarranted and unnecessary when this very information is in the files of the FTC and there is no reason why it should not be produced.

On December 19, 1975, the parties reached a stipulation apparently regarding the documents involved in the present motion and the stipulation was incorporated into an order of the same date. However, it immediately became clear that the parties had differing interpretations of the meaning of the stipulation and order. This Court, after a hearing on March 3, 1976, entered an Order requiring production in accordance with defendant's Request Nos. 28 and 29 of information in the *Goodyear*, *Firestone* and *T. B. A.* cases. Belatedly, plaintiff's opposition did not crystalize until after the Order was entered and on March 25, 1976, plaintiff sought to modify the Court's Order in three respects. First, that data ordered produced regarding market share, sales volume, public injury and/or restraint of trade or lessening of competition in the tire industry should be limited only to the violations alleged in this case. Secondly, that confidential and privileged documents contained in the *Goodyear* and *Firestone* cases and, specifically, all Civil Investigative Demand documents, all documents subpoenaed by the grand jury and covered by a protective order, and all internal memoranda or material prepared by the trial staff in those cases for internal review and consideration not be included in the material set forth in the order. Thirdly, that a protective order be entered to reflect the first two modifications and to exempt the plaintiff from having to segregate all non-confidential documents from confidential documents in the *Goodyear* and *Firestone* cases.

In an effort to identify the area of disagreement remaining between the parties, recent events have narrowed the issue somewhat. On April 1, 1976, Attorney McSpadden stated in an affidavit that certain nonconfidential documents were available to the defendant at the Department of Justice. These documents, of course, are not the subject of the present motion. A number of documents have been provided the defendant, including the "Gether Report," which contains statistics of the tire industry. Some material from the *Goodyear* and *Firestone* cases has been given to the defendant. Plaintiff has filed a letter by counsel for Goodyear Tire & Rubber Company wherein counsel asserts the confidential nature of the documents held by the Department of Justice which are the property of the Goodyear Company and were obtained by the Department in the *Goodyear* case.[1] Additionally,

[1] Dudley B. Tenney, counsel for Goodyear Tire & Rubber Company, further states: "It may be pertinent to call to your attention that all information about the tire industry which would actually be useful in consideration of an enforcement proceeding is, we believe, available from public sources. For example, statistics on tire shipments are published quarterly and annually by the Rubber Manufacturers' Association and are readily available. From these statistics information as to O. K. Tire & Rubber Company's market share can be quickly and easily developed without the necessity of invading the privacy of confidential business information of particular tire companies."

eleven reports from "Who's Who in the Replacement Market for Passenger Tires" prepared by the Firestone Company[2] and a report entitled "Rubber Industry Facts" have been made available to the defendant. A copy of Firestone's motion to dismiss in the *Firestone* case, which contained market share information, has been turned over to the defendant.[3]

Despite the above information having been furnished, defendant has filed a second Rule 37 motion seeking sanctions and production of internal memoranda, summaries and analyses of the Antitrust Division in the *Goodyear* and *Firestone* cases. Defendant's original Requests #28 and #29 sought facts pertaining to market shares and the like in the tire industry; however, defendant's recent memorandum indicates that it desires much more, including the legal analyses, opinions and conclusions of the Government attorneys who participated in the *Goodyear* and *Firestone* cases.[4] Counsel for the plaintiff states that this involves 41 reevaluation memorandums and 2,535 other internal memorandums. In addition, the analyses contained in the internal memorandums were composed of data derived by the grand jury, material obtained pursuant to Civil Investigative Demands and material covered by protective orders issued in the *Goodyear* and *Firestone* cases.[5] Furthermore, the point sticking in plaintiff's craw is defendant's attempt to obtain the discussions contained in memoranda of the Antitrust Division which would reveal the Division's policy priorities, its resource limitations, enforcement guidelines, and legal theories which it may or may not rely on in future cases.

Plaintiff asserts two privileges in support of its refusal to produce internal memoranda: (1) the intra-agency memoranda privilege, and (2) the work product privilege. The Court finds that defendant has failed to make the requisite showing to pierce the work product privilege. Defendant has not shown the required "substantial need" and "undue hardship to obtain the substantial equivalent of the materials by other means." Rule 26(b)(3), F. R. Civ. P. The information provided thus far appears to contain the data sought by Requests #28

[2] Counsel for defendant indicates that the "Who's Who Report" has not yet been provided, but that a stipulation is in the making which should result in the production of this report.

[3] Counsel for the plaintiff has informed the Court that it has approached defendant and stated that it would seriously consider entering into a stipulation as to the percentages of the tire replacement shares held by the five largest companies and by the O. K. Tire & Rubber Company, in return for defendant's withdrawal of its request for internal memoranda.

[4] Defendant's Reply Memorandum, filed May 3, 1976, at page 5, states: "Furthermore, *Firestone* and *Goodyear* necessarily involved a detailed analysis of the competitive structure of the tire industry of the United States. These facts and economic analyses, as well as statements of the *legal significance* of market structure and competitive impact of various practices, are directly related to the present case "and both the Court and defendant should have access to them." (emphasis added)

[5] Plaintiff indicates that a list of over 200 sources of the documentation is being prepared in order to return the documents to these sources. As soon as the list is prepared, the Department of Justice intends to furnish this list to the defendant so that it can directly contact these third parties to obtain consent to look at confidential documents, should defendant so desire.

and #29. Further, it would appear (or at least a contrary showing has not been made) that much of the desired information may be obtained from public documents,[6] or potentially from sources who provided information in the *Goodyear* and *Firestone* cases. In short, defendant's showing is inadequate to enable it to invade the work product of Government attorneys in another case,[7] and where the avenue for obtaining the information is blocked by the additional obstacles of confidentiality embodied in the Civil Investigative Demands, grand jury subpoenas and protective orders in the *Goodyear* and *Firestone* cases.

Based on the foregoing, the Court decrees that the following order, modifying this Court's order of March 11, 1976, be entered:

It Is Hereby Ordered that consideration of plaintiff's motion for partial summary judgment on liability be continued until August 2, 1976, to permit defendant an opportunity to complete discovery. Appropriate opposition to the motion for partial summary judgment shall be filed and served within twenty (20) days from and after said date.

It Is Further Ordered that prior to August 2, 1976, the defendant shall inspect and copy, and the plaintiff shall produce or otherwise make available to defendant in Washington, D. C., for examination and copying all documents relating in any way to market share, sales volume, public injury, and/or any restraints of trade or lessening of competition in the tire industry, in the possession of the Department of Justice or the Federal Trade Commission as set forth in plaintiff's request for production of documents #28 and #29 on file herein, including, specifically, the documents relating to the *Goodyear* and *Firestone* cases, and the documents relating to the "T. B. A." cases, as well as such additional documents in the possession of the plaintiff as relate to the present case and related investigations and are responsive to defendant's document requests. *Provided that* plaintiff need not provide internal memoranda nor shall plaintiff be required to provide documents assembled pursuant to grand jury subpoenas and Civil Investigative Demands in the *Goodyear* and *Firestone* cases or

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[6] The necessity for production is reduced where an available alternative for obtaining the desired information has not been explored (*General Services Administration v. Benson*, 415 F. 2d 878, 881 (9th Cir. 1969)), and, as this Court adds, where such alternative offers a less intrusive and less expansive approach than inquiry into confidential and privileged information.

Since the Department of Justice is in the process of compiling a list of the sources of documents gathered in *Goodyear* and *Firestone*, it is not unreasonable to require the plaintiff to examine the documents therein to determine whether non-confidential public documents containing statistics of the tire market and industry are included. As before, where the Department provided defendant non-confidential information from these cases and others, it should provide such so-called public documents to the defendant under the guidelines of Requests #28 and #29.

[7] The fact that litigation has terminated does not cause the work product prepared incident thereto to lose its qualified immunity extended under the rule, and hence it does not become freely discoverable in a subsequent and unrelated litigation. *Duplan Corporation v. Moulinage et Retorderie de Chavanoz*, 487 F. 2d 480 (4th Cir. 1973) and 509 F. 2d 730 (4th Cir. 1974), *cert. denied*, 420 U. S. 997, 95 S. Ct. 1438, 43 L. Ed. 2d 680 (1975).

documents containing information governed by protective orders in said cases.

GROLIER, INC., et al. v. FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 76-428. F.T.C. Docket No. 8879.

(United States District Court, District of Columbia, June 15, 1976)

On defendants' motion to dismiss an action seeking to compel production of documents pursuant to the Freedom of Information Act, court held that, where plaintiffs made a request for documents pursuant to section 3.36 of the Commission's Rules of Practice and, not the Freedom of Information Act, absent a formal request under the Act, the court has no subject matter jurisdiction over the plaintiffs' claim.

Before FLANNERY, *District Judge.*

ORDER

This matter comes before the court on defendants' motion to dismiss based on lack of subject matter jurisdiction. Plaintiffs seek to compel production of documents pursuant to the Freedom of Information Act, 5 U.S.C. § 552, despite the fact that they admittedly did not make an express request for the material pursuant to the Act prior to initiating this action. Plaintiffs contend that it was sufficient for them to request the documents pursuant to the discovery rules of the defendant Federal Trade Commission, 16 CFR § 3.36, and that the Commission had a statutory obligation to deliver all material not exempted from the Freedom of Information Act even in the absence of an express invocation of that Act by plaintiffs.

Plaintiffs' argument depends upon the congruency of the Commission's discovery rules and the Act. It is clear, however, that the standards for obtaining information under the rules of the Act are not the same, and the two provisions will not necessarily result in the same production of information. Requests for discovery under § 3.36 are governed by relevancy of the requested information to the administrative proceeding, whereas production under the Act depends upon whether one of the Act's enumerated exceptions applies. In a given case, a request for information might succeed under § 3.36 yet fail under the Act because such information would be relevant but within one of the Act's exceptions, or it might succeed under the Act yet fail under § 3.36 because it was not exempted from the Act but was not relevant to the proceeding at hand. Additionally, the Supreme Court has noted on several occasions that the Act was designed to inform the public about agency action and not to benefit private litigants by supplementing their discovery rights against the agency. *See, e.g.,*

* Not otherwise reported.

NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10 (1975); *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974).

Given the different standards for § 3.36 and the Act, it is not reasonable to impose an obligation on the Commission to treat every request for discovery as a request under the Act. The Commission cannot fairly be said to have had an opportunity to respond to a Freedom of Information Act request until that request has, in fact, been made. Courts in this circuit have taken a rigid view of the requirement of a request under the Act, as is suggested by the recent case of *Center for National Policy Review* v. *Richardson*, — F.2d — No. 75–1431 (D.C. Cir. February 25, 1976), where the court insisted that one seeking information under the Act must "begin at the beginning" by making a formal request. *Id.* at 4. Plaintiffs here failed to do so. In the absence of such a request, this court has no jurisdiction over plaintiffs' claim.

Upon consideration of defendants' motion, memoranda submitted by counsel, the entire record herein, and oral argument thereon, and for the reasons stated above, it is, by the court, this 15th day of June, 1976,

ORDERED that defendants' motion to dismiss should be, and the same hereby is, granted.

FORD MOTOR COMPANY v. FEDERAL TRADE COMMISSION*

J. WALTER THOMPSON COMPANY v. FEDERAL TRADE COMMISSION*

Nos. 75–1041, 75–1043. F.T.C. Docket Nos. C–2582, C–2595.

(United States Court of Appeals, Sixth Circuit, June 21, 1976)

1. HEARING AS TO VALIDITY OF CONSENT ORDER FROM WHICH RESPONDENTS ATTEMPTED TO WITHDRAW PRIOR TO ITS FINALIZATION IS WITHIN COURT'S JURISDICTION.

Court of Appeals had jurisdiction to hear dispute between the Federal Trade Commission and automobile manufacturer and its advertising agency concerning the validity of a "consent" agreement pertaining to unfair advertising charges, which dispute concededly arose by dint of an attempt by the manufacturer and advertising agency to withdraw their consent before the agreement became final.

2. PRIMARY PURPOSE OF CONSENT ORDERS IS TO ELIMINATE THE ADJUDICATORY PROCESS, AND SUPPORT FOR SUCH ORDERS IS UNNECESSARY.

Federal Trade Commission was not required to support its consent orders by findings of fact and conclusions of law; in fact, the principal purpose of a consent order is to avoid the fact finding and adjudicatory process.

3. IF PROPOSED ORDERS WERE WITHDRAWN LEGALLY BEFORE BECOMING FINAL AND BINDING, OR IF F.T.C. ABUSED ITS DISCRETION, WAIVER OF RIGHT TO JUDICIAL REVIEW WOULD BE WITHDRAWN.

Waivers by respondents of their rights to judicial review of proposed consent cease and desist orders entered by the Federal Trade Commission on charges of unfair advertising would be withdrawn if either the consent orders were legally withdrawn before they became final and binding, or if the Commission abused its discretion in failing to allow respondents to withdraw their consent.

4. DUE PROCESS WAS NOT VIOLATED WHERE LANGUAGE OF F.T.C. RULES WAS CONSISTENT WITH ITS DETERMINATION THAT SUCH RULES PROHIBITED THE UNILATERAL WITHDRAWAL OF RESPONDENTS' ORDERS.

Federal Trade Commission's interpretation of its rules as prohibiting motor vehicle manufacturer and its advertising agency from unilaterally withdrawing their proposed consent orders, in respect to charges of unfair advertising, was consistent with the language of the rules and did not offend due process.

5. WHERE RECORD INDICATED THAT MAJOR COMPETITOR ENTERED INTO CONSENT AGREEMENT CONTAINING SIMILAR PROHIBITIONS THE DAY BEFORE ORDERS AGAINST PETITIONERS WERE FILED, F.T.C. DID NOT ABUSE ITS DISCRETION IN REFUSING TO WITHDRAW ITS OWN PROVISIONAL CONSENT WHICH RESPONDENTS CLAIMED PLACED THEM AT UNFAIR DISADVANTAGE.

Federal Trade Commission did not abuse its discretion by refusing to withdraw its own provisional consent to "consent" [955] cease and desist orders when automobile manufacturer and advertising agency sought such action on ground that subsequent developments concerning a major competitor showed that they

* Reported in 547 F.2d 954 (1976) as amended by the court December 10, 1976; *cert. filed* 3–09–77. For cases before the Commission, see 84 F.T.C. 729 and 84 F.T.C. 736, respectively.

were being placed at an unfair competitive disadvantage by the consent orders, where the record showed that, on the day before the orders against petitioners were entered, the FTC had entered an order against petitioners' major competitor containing a similar broad prohibition concerning motor vehicle performance claims.

(Syllabus, with substituted captions, taken from 547 F.2d 954)

On a consolidated appeal for reconsideration, court held that the F.T.C. had not abused its discretion by refusing to withdraw its consent to agreements in response to petitioners' claim of unfair competitive disadvantage, where record indicated that major competitor entered into a consent agreement containing similar broad prohibition the day before petitioners' orders were filed; nor was there any violation of due process where the language of Commission's rules was consistent with its determination that such rules prohibited petitioners from unilaterally withdrawing their consent agreements.

The Commission's orders are affirmed.

Robert L. Wald, Philip Elman, Keith S. Watson, Wald, Harkrader & Ross, Thomas C. Mathews, Jr., Washington, D.C., *Hugh P. Connell, John Byron Hackett*, New York City, for petitioners in No. 75–1041.

Robert L. Wald, Philip Elman, Keith S. Watson, Wald, Harkrader & Ross, Thomas C. Mathews, Jr., Washington D.C., for petitioner in No. 75–1043.

Calvin J. Collier, Gerald Harwood, Mark W. Haase, Gen. Counsel, Federal Trade Commission, Washington, D.C., for respondent in Nos. 75–1041 and 75–1043.

Before EDWARDS, CELEBREZZE and MCCREE, *Circuit Judges*.

EDWARDS, *Circuit Judge*:

These are consolidated petitions filed by the Ford Motor Company and J. Walter Thompson Co., its advertising agency, to review and set aside certain "consent" cease and desist orders entered by the Federal Trade Commission against both concerns. The underlying actions were brought by complaints issued under Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b)(1970), involving alleged unfair advertising of Ford Division products. One ad concerned the assertion that Ford Division cars were quieter than a glider in flight (which FTC contends isn't quiet at all). The other ad showed the alleged structural strength of Ford cars to resist lateral impact by having a hoist pick one up by the side rails. (The ability of the side guard rails to sustain the weight of the car does not, in FTC's view, prove much about their resistance to lateral impact.)

Both companies and FTC negotiated a proposed consent order under the FTC Rules then applicable. 16 C.F.R. §§ 2.31–2.35 (1974).[1] The companies filed the consent orders properly executed by them, and the FTC provisionally accepted the proposed order. The rules also provided for the publication of the consent order for a period of sixty days in which FTC would accept comments, after which time the FTC would make a decision on whether or not finally to accept the consent order.

Ford and J. Walter Thompson assert that they were told during the negotiations by FTC representatives that FTC would not accept consent orders limited narrowly to the claims actually made in the pending complaints. Thereupon the order was drafted and consented to by the companies, applicable to all performance claims for the indefinite future. It is the breadth of the language employed in this regard which triggered this controversy.

Ford and J. Walter Thompson assert that during the sixty-day publication period, they learned that FTC had agreed with General Motors and its advertising agencies to a consent order limiting certain practices complained of in relation to that corporation to the specific practices involved. Ford then wrote the FTC indicating that the reported terms of the General Motors agreement would place Ford at a competitive disadvantage, that the consent order was no longer acceptable to Ford, and asking FTC to recall its provisional acceptance. FTC did not respond substantively to these communications, and on August 13 and 14, 1974, J. Walter Thompson and Ford filed letters of withdrawal of their consent. Thereafter, on October 21, the Secretary of the FTC wrote Ford and J. Walter Thompson that FTC rules don't authorize unilateral withdrawal by a respondent and that **[956]** FTC would not withdraw its provisional acceptance. On November 19, 1974, FTC issued a final order to this effect. Both Ford and Thompson filed motions for reconsideration with FTC which motions were denied, resulting in this litigation.

[1] We believe that this court has jurisdiction to hear a dispute between these parties concerning the validity of a "consent" agreement which dispute concededly arose by dint of an attempt to withdraw consent before the agreement became final. *See Swift & Co.* v. *United States*, 276 U.S. 311, 324, 48 S.Ct. 311, 72 L.Ed. 587 (1928); *Martin Marietta Corp.* v. *Federal Trade Commission*, 376 F.2d 430, 434 (7th Cir.), *cert. denied*, 389 U.S. 923, 88 S.Ct. 237, 19 L.Ed.2d 265 (1967).

Two other of the issues presented by the parties in this case may be disposed of quickly.

[2] First, petitioners Ford and Thompson argue that respondent Federal Trade Commission was required, but failed, to support its

[1] The rules have since been revised. *See* 40 Fed.Reg. 15235–36 (1975). The revision would not, however, necessarily avoid reoccurrence of the sort of dispute involved in this case.

consent orders entered in this case by findings of fact and conclusions of law. As we understand both the general nature of a consent order and the specific terms of the FTC rule applicable at the relevant times in this case, 16 C.F.R. §§ 2.31–2.35 (1974), the principal purpose of a consent order is to avoid the fact finding and adjudicatory process which petitioners now seek. Assuming that the consent orders herein were otherwise final and valid, we find no merit to this argument.

[3] Second, respondent FTC claims that petitioners' current case should be dismissed because in the proposed consent orders they waived their rights to judicial review. The short answer to this argument is that generally the tail goes with the hide. Petitioners claim that their consent orders were legally withdrawn before they became final and binding. They also claim, in the alternative, that it was an abuse of discretion on the part of the Commission to fail to allow them to withdraw their consent. In either instance, the waivers of judicial review would be withdrawn with the consent orders.

We would phrase and answer the principal issues in this case as follows:

1) Was the Commission's interpretation of its consent order rules consistent with their language and with due process to the extent that they prevented petitioners' attempted unilateral withdrawal of consent?

We answer this question affirmatively.

2) Assuming the affirmative answer above, the remaining issue is: Even if petitioners were not themselves privileged to withdraw their proffered consent orders, did the Commission abuse its discretion by refusing to withdraw its own provisional consent when petitioners sought such action on the grounds that subsequent developments concerning a major competitor showed that petitioners were being placed at an unfair competitive disadvantage by the consent orders?

We answer this question in the negative.

The Consent Order Rule

Petitioners contend that:

> [T]he Commission's Rules placed no limitation on a respondent's right to withdraw consent before final action by the Commission and the Commission had never previously announced any interpretation of its Rules to preclude such withdrawal.

Respondent FTC in turn contends that the Commission's interpretation of its own rules is entitled to great deference and it interprets Rules 2.31–2.35 as not permitting unilateral withdrawal by petitioners. In this regard it analogizes the tender of the consent order to a stipulation of fact tendered to a court of law. It also emphasizes that Rule 2.34(b) by its terms allows the Commission to withdraw its

"provisional consent," but does not provide any such right to petitioners. It therefore argues that the Latin maxim *expressio unius est exclusio alterius* (The mention of one implies the exclusion of others) applies to this case.

We consider the stipulation analogy and the cases illustrating it to be inapposite. **[957]** The admission of facts and the consent to an order are neither identical nor even closely comparable. But certain provisions of the rules themselves are persuasive that Ford was intended to be bound.[2] These provisions call for 1) provisional acceptance by the Commission, 2) publication of the consent agreement with an invitation for public comment thereon for a period of sixty days, and 3) a one month period after receipt of public comment for the Commission to withdraw consent or to make its provisional acceptance final. As we see these separate provisions, they provide a final review of the proposed order after public scrutiny, with the Commission having the final right in the public interest to escape from the consequences of the provisional consent if public comment provides objections which were not previously considered. The Commission thus has reason to withhold its final approval and it likewise has reason not to extend that same right to withdraw to the party proposing the consent. The time limitations are reasonable ones. The party proposing the consent order is not left unilaterally committed for an indefinite period.

[4] We conclude that the Commission's interpretation of its rules as prohibiting Ford and Thompson from unilateral withdrawal of their proposed consent orders is consistent with the language of the rule, does not offend due process, and should be accepted by this court. In this regard we recognize the deference due the Commission's interpretation of its own rules as frequently declared by the United States Supreme Court. *Udall* v. *Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 65 S.Ct. 1215, 89 L.Ed. 1700(1945).

The Competitive Disadvantage Issue

As to petitioners' claim of abuse of discretion, the position of the parties is fully stated by the following excerpts from the first of

[2] (b) Upon receiving such an agreement, the Commission may: (1) Accept it; (2) reject it and issue its complaint and set the matter down for adjudication in regular course; or (3) take such other action as it may deem appropriate. If an agreement is accepted, the Commission will place the order contained therein on the public record, and at the same time, will make available an explanation of the provisions of the order and the relief to be obtained thereby and any other information which it deems helpful in assisting interested persons to understand the terms of the order. For a period of sixty (60) days after placement of the order on the public record and issuance of the statement, the Commission will receive and consider any comments or views concerning the order that may be filed by any interested persons. Thereafter, within thirty (30) days, the Commission may either withdraw its acceptance of the agreement and so notify the other party, in which event it will take such other action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require), and decision in disposition of the proceeding. 16 C.F.R. 2.34(b)(1974).

several Ford letters concerning this issue and from the single responsive letter from the Commission.

Ford's (and presumably Thompson's) Position

The Commission's Inconsistent Treatment of Ford and General Motors

While the Commission was investigating and negotiating with Ford concerning its "Lift" and "Glider" commercial, it was also investigating and subsequently litigating with General Motors the legality of Vega and Opel commercials in Docket No. 8907. Although the charges against General Motors were, in our view, more serious than those against Ford,* Ford believed that because of the strenuous competition between these two leading manufacturers, the Commission would consider the two matters in parity and [958] apply equivalent and nondiscriminatory regulatory standards to both. This, historically, has been the Commission's pattern. Thus, in entering into consent negotiations in an effort to avoid prolonged and wasteful litigation, Ford justifiably expected that the ultimate disposition of the *General Motors* case would not place Ford at an unfair competitive disadvantage.

In entering into consent negotiations Ford was advised by the Commission staff that, while the advertising challenged dealt only with claims of "quietness" and "structural strength," any Order to be acceptable to the Commission must, as a matter of policy, cover "performance" claims as well. Recognizing that cease and desist orders have traditionally been broader in scope than the particular practice challenged, Ford was willing to consider such an Order. At no time did it occur to Ford or indeed appear plausible, that the Commission would consider applying a different standard in the *General Motors* case, in contravention of such policy.

It has now come to Ford's attention, through trade reports, that General Motors may have entered into a consent agreement with the staff in settlement of its case which contains an order limited to the claims challenged in its complaint (comparative "handling" claims) and fails to include the broad coverage of "performance" claims contained in the provisional Ford Order. This would be a far less stringent standard than applied in the *Ford* case and, if allowed to stand, would place Ford at such a competitive disadvantage as to make the Ford Order unacceptable.

We do not know with certainty that such an agreement has been reached in the *General Motors* case. None is contained in the public record, but the Commission's public record does show an order of the Administrative Law Judge, dated May 3, 1974, containing a recitation that, on May 2, 1974, "it was indicated that a proposed consent settlement had been reached between complaint counsel and respondent General Motors * * *." Reports in the industry appear to confirm that an agreement has been reached.

So fundamental a difference in the compliance obligations which Ford and General Motors would carry under these Orders—particularly since the greater burden on Ford bears no relationship to the severity of the charges involved—would constitute an intolerable intrusion by the Commission into competition between the two companies. While this difference may result from the fact that the agreements were apparently negotiated by separate components of the Bureau of Consumer Protection, it cannot be justified on that basis. The Commission's obligation to protect the public interest carries with it a concomitant responsibility to regulate similarly situated competitors in the same industry in a fair, equal and evenhanded manner.

* The Commission in the Ford Complaint charged that certain advertising demonstrations did not prove the qualities of "strength" and "quietness" allegedly represented in the advertisements, but the Commission at no time challenged the truthfulness of the basic product claims themselves; the Commission in the General Motors Complaint, in contrast, challenged as untruthful the basic product claims made in the ads.

Ford has already suffered damaging publicity as a result of the unfortunate circumstances described above. To avoid further damage and to remain competitive, we must now ask that the Commission take action to assure that equivalent "fencing-in" of the two companies will result from entering these Orders. We, therefore, request, in light of the substantially narrower Order reportedly agreed upon in General Motors, that the Commission now recall the provisional Ford Order and similarly reduce its coverage to the claims actually challenged in the Ford Complaint, i. e., structural strength and quietness, eliminating the reference to broad general "performance" claims which now seems wholly inappropriate.

We urgently request the Commission's prompt consideration of this matter. Since the 60-day period during which the provisional Ford Order remains on the public record will expire on August 15, we ask for a reply sufficiently in advance of that date so Ford may determine what further action, if any, may be necessary in order to protect the Company's interests.

[959] *The Commission's Reply*

This is in response to your letters of July 12, August 8, and August 14, 1974 which the Secretary acknowledged by letter of August 19, 1974.

With respect to the purported withdrawal by Ford Motor Company from the Agreement Containing Consent Order to Cease and Desist, dated December 14, 1973, in File No. 722 3122, you are advised that the Commission's Rules of Practice do not authorize unilateral withdrawal by a respondent from an agreement accepted by the Commission pursuant to Subpart C thereof (Sections 2.31 through 2.35, inclusive). The Commission has, however, reviewed the facts and considerations set forth in your letters as argument in support of a request that the Commission withdraw its acceptance of the Agreement. The Commission finds that the public interest would not be served by such action.

The Commission's brief filed in this appeal adds little to the modicum of information provided above. It complains about the lack of specificity in the petitioners' allegations concerning the General Motors consent order (which petitioners, as of the July 12, 1974, date could not have seen). It also argues:

Besides, while the GM consent order is less restrictive than the Ford consent order in one respect, the GM order is substantially *broader* in coverage. The advertising ban in the Ford order applies only to *some* vehicles, while the GM order applies to *all vehicles*. (J.A. 17, Pet. Br. A–15). Understandably, Ford does not complain about *this* aspect of its consent order.

Basically, however, the Commission simply refused to comment on, talk about, or give evidence of any serious consideration to petitioners' claims of competitive disadvantage arising after petitioners had filed their consent orders because of the assertedly more favorable treatment of Ford's prime competitor, General Motors.

While we have previously upheld the Commission's contention that petitioners had no absolute right to withdraw their consent orders, petitioners also timely sought the Commission's own withdrawal of its "provisional" consent. *See generally Sunshine Art Studios, Inc.*, FTC File No. 682 3221. This action was clearly within the Commission's

powers as defined by its own rules. The Commission's refusal to withdraw its consent is reviewable by this court for abuse of its discretion under Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)(1970). *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

The General Motors order referred to by petitioners is now, of course, a matter of public record. The differences in treatment are real ones:

The Ford Order

IT IS ORDERED that respondent, Ford Motor Company, its successors and assigns, its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution, in commerce as "commerce" is defined in the Federal Trade Commission Act, of the Ford LTD automobile, the Ford Galaxie automobile or any other motor vehicle marketed by the Ford Division, do forthwith cease and desist from:

(a) Unfairly or deceptively advertising any such product by presenting evidence, including tests, experiments, or demonstrations, or the results thereof, that appears or purports to be evidence of the structural strength, quietness or performance of such product, that is material to inducing the sale of such product, but which is not competent or reliable evidence to prove such fact or product feature.

(b) Making any statements or representations directly or by implication, concerning the structural strength, quietness or performance of the said products or any part thereof, unless there exists a reasonable basis for such statements or representations; provided [960] that such a reasonable basis shall consist of competent and reliable scientific tests or other competent and reliable objective materials, including competent and reliable opinions of scientific, engineering or other experts who are qualified by professional training and experience to render competent judgments in such matters.

The General Motors Order

I. IT IS ORDERED that respondent General Motors Corporation, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any automobile, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication, in any manner, including the use of any endorsement, testimonial or statement made by any individual, group or organization, that any automobile is superior in handling to any other automobile or all other automobiles, unless at the time that any such representation is first disseminated:

(a) respondent has a reasonable basis for such representation, which shall consist of a competent scientific test or tests that substantiate such representation; and

(b) respondent's agents, employees or representatives who are responsible for engineering approval of any advertisement containing such representation rely on such test or tests in approving such advertisement and provide to respondent's agents, employees or representatives who are responsible for approval of such advertisement a written statement that such test or tests exist which substantiate the representation.

Thus Ford, under the disputed consent order, would be subject to a direct Commission order to cease and desist from not just the structural strength and quietness claims (which triggered this complaint), but from *all performance claims* which may be deemed based on false or deceptive advertising.

General Motors, on the other hand, is under no such broad continuing restrictions. Its order is limited to the subject of the complaint against it, namely, superiority in handling.

The majority of this court (Judge McCree dissenting) initially saw these facts as stating a claim of discriminatory treatment which warranted remand to the Commission for hearing. A slip opinion issued with such a disposition on this question.

On motion for rehearing the FTC, for the first time, cited to this court another order which it had entered against General Motors Corporation. This order, entitled "In the Matter of the General Motors Corporation, Docket No. C–2564," was entered on October 7, 1974, the day before the orders against petitioners Ford and Thompson which are the subject of these petitions. The terms of this General Motors order follow:

IT IS ORDERED that respondent General Motors Corporation and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of automobiles, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, by reference to a test or tests, that any of respondent's automobiles is superior with regard to fuel economy to any other automobiles, whether manufactured by respondent or others, unless:

(a) such superiority has been demonstrated, as to the model(s) for which it is claimed, by such test or tests with respect to each sample, or the valid average of all identical [961] samples, of each model represented to have been tested; or

(b) the valid test results for each sample, or the valid average of all identical samples, of each model so compared, including the advertised model as well as such makes and models to which the advertised model is compared, are clearly and conspicuously disclosed.

For the purpose of this order "sample" shall mean an actual automobile tested. It is provided, however, that nothing contained in this paragraph is intended to conflict with any guidelines, rules or regulations with respect to fuel economy testing or advertising that may hereafter from time to time be promulgated by any agency of the United States Government, and, if such conflict does occur, the guidelines, rules or regulations shall govern.

2. Misrepresenting in any manner the fuel economy of any automobiles or the superiority of any automobile over competing products in terms of fuel economy.

3. Representing, directly or by implication, by reference to a test or tests, that the performance of any automobile has been tested either alone or in comparison with other automobiles unless such representation(s) accurately reflect the test results and unless the tests themselves are so devised and conducted as to substantiate each such representation concerning the featured tests.

4. Misrepresenting in any manner the purpose, contents or conclusion of any test, report or study, relating to the performance of its automobile.

For purposes of paragraphs 3 and 4 of this order, "test" shall include demonstrations which are claimed to be proof of the representations made.

5. Disparaging the quality or properties of any competing product or products through the use of false or misleading comparisons relative to fuel economy.

6. Placing in the hands of dealers for any of the products of the company an advertisement which contains any of the representations prohibited by paragraphs 1–5 above.

IT IS FURTHER ORDERED that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

IT IS FURTHER ORDERED that respondent notify the Commission at least Thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that the respondent herein shall within sixty (60) days after service upon them of this order file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

[5] This order was applicable to all General Motors cars. It contained a broad prohibition concerning performance claims similar to that about which the Ford petition to this court complained. Beyond doubt, if the Commission had furnished a citation to this order in its brief or argument to this court, no remand order would have ever been issued. We note and accept the Commission's apologies for omission of an essential portion of the available records of the Commission as to the competitive disadvantage claim.

Therefore as to the second principal issue in this case (*i. e.* Ford's and Thompson's competitive disadvantage claims), we find no abuse of the Commission's discretion and the orders complained of in these petitions are affirmed.

FEDERAL TRADE COMMISSION v. J. F. LONNING, President, and KELLOGG COMPANY*

No. 75-1176. F.T.C. Docket No. 8883.

(United States Court of Appeals, District of Columbia Circuit, June 24, 1976)

1. INFORMATION CONCERNING QUALITATIVE FORMULAE AND INDIVIDUAL BRAND COSTS FOR READY-TO-EAT CEREALS WAS PROPERLY REQUIRED OF MANUFACTURERS BY SUBPOENA DUCES TECUM.

   [203] In administrative proceeding before Federal Trade Commission in which leading manufacturers of ready-to-eat breakfast cereals were accused of certain improper trade practices, manufacturers were properly required by subpoena duces tecum to produce information concerning qualitative formulas for ready-to-eat cereals and individual brand costs of such cereal.

2. THERE WAS NO ABUSE OF DISCRETION IN LIMITING DISCLOSURE OF SUBPOENAED INFORMATION ALLEGED TO CONSIST OF "TRADE SECRETS" TO COUNSEL OF RECORD.

   Where information subpoenaed by Federal Trade Commission in administrative proceedings against manufacturers of ready-to-eat cereals was alleged by manufacturers to consist of "trade secrets," there was no abuse of discretion in limiting disclosure of such information to counsel of record.

(Syllabus, with substituted captions, taken from 539 F.2d 202)

On appeal, court held that district court, in limiting information disclosure to counsel of record did not abuse its discretion and enforcement of the subpoena duces tecum was proper.

Affirmed.

Appeal from the United States District Court for the District of Columbia (Miscellaneous 74-122).

Edwin S. Rockerfeller, Washington, D.C., with whom *Richard Haddad*, Washington, D.C., was on the brief, for appellants.

Denis E. Hynes, Atty., F.T.C., Washington, D.C., for appellee. *Gerald Harwood*, Asst. Gen Counsel, F.T.C. and *Karl H. Buschmann*, Atty., F.T.C., Washington D.C., were on the brief for appellee.

Before MACKINNON and ROBB, *Circuit Judges*, and BRODERICK,** United States District Judge for the Eastern District of Pennsylvania.

BRODERICK, *District Judge*:

This is an appeal by J. F. Lonning and Kellogg Company (Kellogg)[1] from an order of the district court dated January 3, 1975, granting enforcement of two specifications of a subpoena *duces tecum* issued by the Federal Trade Commission (FTC) in an administrative proceeding

* Reported in 539 F.2d 202 (1976).

** Sitting by designation pursuant to 28 U.S.C. § 292(d).

[1] All references herein to Kellogg include J. F. Lonning, President of Kellogg.

entitled *In the Matter of Kellogg Company, et al.* The district court ordered that Kellogg appear before a duly designated representative of the FTC upon not less than five days notice to testify and produce the documents requested in specifications I.10 and II.10 of the subpoena *duces tecum* issued by the Commission on February 14, 1973. Kellogg contends that the district court should have denied enforcement of the subpoena *duces tecum* because the documents sought by the FTC contain confidential "trade secrets" which are subject to discovery through an agency subpoena only upon a showing by the agency of relevance and immediate need. Kellogg contends that there can be no finding of immediate need until consideration is given as to whether the less sensitive substitute information offered by Kellogg meets the asserted needs of the FTC. Kellogg contends that neither the district court nor the Administrative Law Judge considered whether the substitute documents offered meet the needs of the FTC and that therefore the requirement of a finding of immediate need has not been met. Kellogg further contends that even if the district court did not err in ordering enforcement of the agency subpoena, the protective order issued by the Administrative Law Judge does not adequately protect Kellogg's trade secrets that the district court abused its discretion in ordering disclosure without a more restrictive protective order.

The Federal Trade Commission is an administrative agency of the United States and is authorized by Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, to prohibit unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. Kellogg is a Delaware corporation with its principal place of business located in Battle Creek, Michigan and is the largest producer of ready-to-eat cereals in the United States.

[204] The present controversy arises out of an administrative proceeding pending before the FTC. On April 26, 1972, the FTC issued a complaint alleging that Kellogg, along with the other three leading manufacturers of ready-to-eat cereals, General Mills, General Foods, and Quaker Oats, have engaged in certain conduct and practices which violate Section 5 of the Federal Trade Commission Act.[2] The complaint alleges that Kellogg, along with the three other major producers of ready-to-eat cereals have a "shared monopoly" in the ready-to-eat cereal markets.[3] The admittedly novel complaint alleges *inter alia:* that respondents have introduced into the market a profusion of ready-to-eat cereal brands; that these cereals are promoted by intensive advertising aimed primarily at children, which advertising conceals the

[2] Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) provides:

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

[3] The complaint does not allege a conspiracy among the respondents. The complaint, in addition to the shared monopoly theory, also alleges that each respondent individually exercises monopoly powers.

true nature of these cereals; that the respondents produce "basically similar" ready-to-eat cereals which are artificially differentiated by emphasizing and exaggerating trivial variations, which practices result in high barriers to entry into the ready-to-eat cereal market. The complaint further alleges various unfair methods of competition in advertising and product promotion, including allegations that the advertising is false and misleading; that Kellogg's program of shelf-space allocation controls the exposure of breakfast food products; that the respondents have made numerous acquisitions the effect of which have been to eliminate competition in the ready-to-eat cereal market and which have enhanced the shared monopoly structure of the ready-to-eat cereal market. Finally the complaint alleges that the respondents, collectively and individually, have exercised monopoly power in the ready-to-eat cereal market by refusing to engage in price competition or other forms of consumer directed promotions. The complaint alleges that these acts and practices on the part of the respondents have resulted in artificially inflated prices for ready-to-eat cereals, profits for the respondents in excess of those which would have been possible in a competitive market, and a lack of price competition in the ready-to-eat cereal market.[4]

Pursuant to Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49,[5] as supplemented by § 3.34 of the Commission's [205] Rules of Practice, 16 C.F.R. § 3.34,[6] complaint counsel for the FTC

[4] The legal sufficiency of the allegations in this admittedly novel complaint are not in issue in this subpoena enforcement proceeding.

[5] Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, provides in pertinent part:

For the purposes of sections 41 to 46 and 47 to 48 of this title the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation, issue an order requiring such person, partnership or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

[6] Section 3.34(b) of the Commission's Rules, 16 C.F.R. § 3.34(b), provides:

(b) *Subpoenas duces tecum.* (1) Application for issuance of a subpoena requiring a person to appear and depose or testify and to produce specified documents, papers, books, or other physical exhibits at the taking of a deposition, or at a prehearing conference, or at an adjudicative hearing shall be made in writing to the Administrative Law Judge, and shall specify as exactly as possible the material to be produced, showing the general relevancy of the material and the reasonableness of the scope of the subpoena. Any motion to limit or quash such subpoena shall be filed within ten (10) days after service thereof, or within such other time as the Administrative Law Judge may allow.

(2) Subpoena duces tecum may be used by any party for purposes of discovery or for obtaining documents, papers, books, or other physical exhibits for use in evidence, or for both purposes. When used for discovery purposes, a subpoena may require a person to produce and permit the inspection and copying of nonprivileged

(Continued)

applied to the Administrative Law Judge for the issuance of a subpoena *duces tecum* against the four firms, including Kellogg. The Administrative Law Judge issued the subpoena against Kellogg on February 14, 1973. Specification I.10 of the subpoena calls for the quantitative formulas of Kellogg's ready-to-eat cereals,[7] and specification II.10 calls for the annual individual brand costs of each of Kellogg's ready-to-eat cereals.[8] On March 16, 1973, Kellogg responded to the issuance of the subpoena by a motion to limit,[9] in which Kellogg

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documents, papers, books, or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of such person.

[7] Specification I.10 calls for the quantitative formula, and all modifications thereof, for each RTE cereal brand introduced after 1970 and each of the following RTE cereal brands:

(a) Kellogg's Corn Flakes
(b) Kellogg's Rice Krispies
(c) Kellogg's Raisin Bran
(d) Kellogg's 40% Bran Flakes
(e) Kellogg's All-Bran
(f) Kellogg's Pep
(g) Kellogg's Krumbles
(h) Kelloggs' Sugar Pops
(i) Kellogg's Sugar Frosted Flakes
(j) Kellogg's Sugar Smacks
(k) Kellogg's Special K
(l) Kellogg's Cocoa Krispies
(m) Kellogg's OK's
(n) Kellogg's Stars
(o) Kellogg's Bran Buds
(p) Kellogg's Froot Loops
(q) Kellogg's Triple Snack
(r) Kellogg's Apple Jacks
(s) Kellogg's Corn Flakes with Bananas
(t) Kellogg's Vanilla Kream Krunch
(u) Kellogg's Strawberry Kream Krunch
(v) Kellogg's Orange Kream Krunch
(w) Kellogg's Product 19
(x) Kellogg's Puffa Puffa Rice
(y) Kellogg's Sugar Frosted Mini-Wheats
(z) Kellogg's Cinnamon Frosted MiniWheats
(z–1) Kellogg's Strawberry Kombos
(z–2) Kellogg's Chocolate Kombos
(z–3) Kellogg's Orange Kombos
(z–4) Kellogg's Rally

(J.A. 21–22).

[8] Specification II-10 calls for annual total costs for each Kellogg RTE cereal brand for 1946, 1950, 1954, 1958, 1962, 1966, 1970 and 1972, indicating separately:

a. the costs of materials (with an identification of the cost of grain);
b. production labor costs;
c. other variable production costs;
d. packaging costs (including an identification of packaging material costs);
e. distribution costs;
f. depreciation;
g. overhead;
h. advertising;
i. promotion;
j. other selling expense.

(J.A. 26–27).

[9] Rule 3.34 of the Rules of Practice for the Federal Trade Commission provides that objection to a subpoena issued by the Commission should be in the form of a motion to limit or quash filed within ten days of the service of the subpoena, or within such other time as the Administrative Law Judge may allow.

argued that it should not be compelled to produce the documents requested in specification II.10 requesting individual brand cost data.[10] Kellogg further stated in its motion that it "intends to object to the production of the documents or tabulations called for by specification II.10 on the grounds that such documents or **[206]** information are irrelevant, that compliance would be unreasonably burdensome, and that disclosure of the information involved would do great injury to Kellogg and to competition in the industry." (J.A. 59). In an order dated April 26, 1973, the Administrative Law Judge granted several of Kellogg's requests to limit the subpoena and granted Kellogg ten days to particularize its position on specification II.10 with respect to relevance, burden and confidentiality. (J.A. 75-77).

On May 1, 1973, a prehearing conference was held during which the problem of possible revelation of trade secrets was argued before the Administrative Law Judge. In an order dated May 3, 1973, the Administrative Law Judge accepted the position of Kellogg that trade secrets need be revealed only when necessary to a proper adjudication of the controversy and stated that:

> [T]he disclosure of alleged trade secrets should be required only if those trade secrets are not only relevant to the issues presented by the complaint, but are also necessary for a proper disposition of this controversy. It may be that something less than that called for by the movant in the subpoena is needed and can be supplied by the subpoenaed party without revealing matters that are more sensitive and which are, therefore, maintained as trade secrets. (J.A. 78).

The Administrative Law Judge then ordered counsel for the FTC to submit "a statement demonstrating the need of the information sought as well as its relevance to a proper adjudication of this controversy." Counsel for the subpoenaed parties were directed to respond to the FTC's statement of need. (J.A. 79). On May 11, 1973, the FTC filed a detailed statement of need setting forth the relevance and need for the several categories of documents requested in the subpoena. (J.A. 80-97). The response of Kellogg to the FTC statement of need was filed on June 8, 1973. In its response, Kellogg argued that the FTC had not established a need for the alleged trade secrets and suggested alternatives for the subpoenaed documents which Kellogg contended would fulfill all of the FTC's needs. (J.A. 98-148). The FTC filed a second statement of need on June 6, 1973, in which it amplified the relevance and need for the subpoenaed documents. (J.A. 149-155). On June 29, 1973, the FTC filed its reply to Kellogg's response of June 8, 1973, in which Kellogg had suggested alternatives. In its reply the FTC set forth its reasons why the proposed alternatives and substitutes

[10] Kellogg did not initially object to specification I.10 requesting quantitative formulas but stated that "several of the specifications (e.g. I.7, I.10) call for the production of documents which Kellogg expects to produce but which Kellogg will argue should not be made available for inspection or copying." (J.A. 59).

offered by Kellogg were inadequate for FTC purposes. (J.A. 156-204). Oral argument was held before the Administrative Law Judge on December 10, 1973, during which the Administrative Law Judge heard arguments by all parties in connection with the FTC's need for the subpoenaed documents and the adequacy of Kellogg's offered alternatives. During the oral argument, the Administrative Law Judge requested suggestions from counsel as to the type of protective order which should be entered in connection with an order to produce the alleged "trade secret" information. (J.A. 249). Kellogg took the position that the individual brand cost data, which would reveal the profitability of Kellogg's various brands, should be disclosed only to counsel of record who are "outside" counsel and should not be revealed to any counsel of record who is inside or house counsel for a respondent. (J.A. 250, 252). The Administrative Law Judge responded to Kellogg's argument by saying that in order to secure even-handedness, the subpoenaed document supplied to the FTC should be available to all counsel of record. (J.A. 254). In an order dated February 12, 1974, the Administrative Law Judge ruled:

> As respects cereal formulas . . . I find that complaint counsel have demonstrated the need for such data and will order disclosure. As respects costs and profits by brand, it appears that such information is also necessary. . . .
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> I turn, next, to the type of disclosure to be given the documents which respondents must disclose to complaint counsel pursuant to this order. At the December 10, 1973, prehearing conference, various [207] proposals were made. . . . Under the circumstances it would appear advisable to require respondents seeking limited disclosure to submit their proposals fc 'he type of disclosure warranted and for all counsel to be given an opportunity to respond to such proposals. This order will so provide, after which another order will specify the type of disclosure to be permitted. The attention of counsel is directed to the types of disclosure contained in the February 7, 1973, order (Confidential A and Confidential B). (J.A. 256-57).

In its response to the above quoted Order of February 12, 1974, Kellogg proposed "Confidential B" treatment under the February 7, 1973, order, for both the quantitative formulas called for in specification I.10 and the individual brand cost data called for in specification II.10. (J.A. 258-263). Confidential B treatment restricts disclosure to counsel of record in the proceeding and their supervisory and clerical employees engaged in the litigation. (J.A. 269). In an order dated March 20, 1974, the Administrative Law Judge adopted Kellogg's proposal and permitted it to designate its subpoenaed quantitative formulas and individual brand cost data by the restrictive Confidential B classification. (J.A. 264-267).

On April 2, 1974, Kellogg filed a request with the Administrative

Law Judge for a determination that the February 12, 1974 and March 20, 1974 Orders were appealable to the Federal Trade Commission. (J.A. 271-281). The Administrative Law Judge denied Kellogg's request in an Order dated April 23, 1974. The Order reviewed the proceedings before the Administrative Law Judge to that date and stated:

> By order dated February 12, 1974, respondents' objections to the subpoenas were overruled, complaint counsel having demonstrated the subpoenaed documents were needed in the prosecution of this proceeding. This conclusion was reached only after due consideration had been given not only to the oral arguments of the parties but the written submissions as well. Thus, complaint counsel showed that formulas were needed to ascertain which cereals were basically similar to other cereals. Such information is necessarily tied to the complaint's allegation of artificial differentiation between cereals. With respect to costs, such information was needed as a toll to determine profits which could indicate the existence of monopoly power. Moreover, costs by brand were needed to arrive at meaningful comparisons between brands which are in competition with each other. As I stated at the December 10, 1973 prehearing conference:
>
> > I see no valid reason for denying costs by brand information. The shared monopoly may or may not exist with respect to the ready-to-eat cereal industry. If it does exist, it may be complaint counsel's argument that it exists because of certain individual brands of respondents. If so, then we get into costs of these individual brands.
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> * * * * * * *
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> The February 12, 1974 order invited respondents to suggest the confidential treatment to be given these classes of documents. In the main, the proposals of respondents were accepted by my order of March 20, 1974. Disclosure was to be limited to counsel of record and their supervisory and clerical employees. . . employees. . . .
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> * * * * * * *
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> * * * Both General Foods and Kellogg argue that the revelation of confidential documents to the other respondents who are their competitors would damage them irreparably and that complaint counsel's need might be satisfied by production of less sensitive data. But these contentions were exhaustively discussed not only in the pleadings of all the parties on complaint counsel's subpoenas but in the oral arguments of May 1 and December 10, 1973. In my order of February 12, 1974, I found that complaint counsel's need had been established. This conclusion, as stated above, was based upon my evaluation of the arguments of [208] all parties prior thereto concerning complaint counsel's need and the inadequacy of respondents' alternatives.
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> * * * * * * *
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> Kellogg argues that it was necessary to provide a reason for the ruling but this ignores the extensive position papers of the parties and the oral arguments held at which such reasons were examined, discussed, argued and commented upon. It was stated earlier and frequently that efforts to preserve trade secrets would be maximized but that, in the last analysis, if the information was necessary, confidential treatment would necessarily be lost. (J.A. 298-300).

On May 2, 1974, Kellogg filed an extraordinary appeal with the Federal Trade Commission seeking review of the orders of the

Administrative Law Judge. Kellogg argued that the counsel for the FTC had made an insufficient showing of need for disclosure of the trade secrets and that there had been insufficient consideration by the Administrative Law Judge of the alternative documents offered by Kellogg. (J.A. 302-323). On May 29, 1974, the FTC denied Kellogg's application for extraordinary review. (J.A. 334-336).

By a stipulation between the FTC and Kellogg dated June 5, 1974, Kellogg stated that it would continue to assert its objections to specifications I.10 and II.10 and would therefore refuse to produce the quantitive formulas and individual brand cost data. (J.A. 337-342). The Commission, pursuant to Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, applied to the district court for enforcement of the two specifications of the subpoena addressed to Kellogg. (J.A. 3-342). The Petition of the FTC included extensive exhibits consisting for the most part, of the pleadings dealing with the subpoena issue in the administrative proceedings. Oral argument was held before the district court on January 3, 1975, during which Kellogg again argued that the FTC had not established the requisite need for disclosure of its trade secrets, that there had been an inadequate consideration of the alternative less sensitive documents offered by Kellogg to satisfy the FTC's need, and that the protective order entered by the Administrative Law Judge was inadequate to protect Kellogg's trade secrets. The district court, at the conclusion of the oral argument, rendered its decision and signed the order enforcing specifications I.10 and II.10 of the subpoena. (J.A. 407-411). The district court stated:

> The court will approve the order presented to the court by, and on behalf of the Commission today.
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> * * * * * * *
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> But I think the Commission not only has shown need, but relevancy, whichever the test may be, for all of the items sought by the subpoena here.
>
> As to the formulas, I think they are relevant and necessary to prove or disprove the basic similarity between the brands, and to show whether or not the respondents have artificially, or are, in fact, artificially, differentiating their brands.
>
> They are also relevant to show whether certain differences are trivial or unusual for purposes of price analyses or artificial product differentiation.
>
> As to the matter of disclosure of the individual brand costs, it appears to the court that knowledge on the part of the Commission may reveal the existence of monopoly profits based on individual brands which would be hidden by the information disclosed already, according to Mr. Connelly's argument, by a technique of aggregating all of such data.
>
> Now, the complaint in the case at bar does not limit the showing of monopoly profits to the overall industry. The exercise of monopoly power as alleged in the complaint can be shown if the price of one cereal is raised which competitors fail to challenge or which competitors will follow by increasing their comparable brand.
>
> I think the decision and the order of the Administrative Law Judge at the present

time is sufficient to protect the trade secrets problem from improper dis[209]closure if the respondents, as they will be ordered to do, comply with this subpoena.

However, if new information—and I underscore the word "new"—develops which will show that subsequent orders of the Administrative Law Judge are issued—and I underscore the word "subsequent"—to that which would infringe on the trade secrets and proprietary rights of the respondent, then they will be permitted to come back to the court for further consideration.

So, therefore, the subpoena issued by the agency will be enforced by the court, and the court will sign the order. (J.A. 407–408).

[1] There is no question that under the Federal Trade Commission Act, the FTC has broad powers to investigate unfair methods of competition, including antitrust violations. To exercise these broad powers, it is essential that the FTC have adequate subpoena powers to compel both testimony and documents. *Federal Trade Commission* v. *Tuttle*, 244 F.2d 605 (2d Cir.), *cert. denied*, 354 U.S. 925, 77 S.Ct. 1379, 1 L.Ed.2d 1436 (1957). The parties agree that there is no absolute immunity protecting a party from the disclosure of trade secrets. *Covey Oil Company* v. *Continental Oil Company*, 340 F.2d 993 (10th Cir.), *cert. denied*, 354 U.S. 925, 77 S.Ct. 1379, 1 L.Ed.2d 1436 (1965); 4 *J. Moore*, Federal Practice § 26–60[4] at 26–243–245 (2d ed. 1974). Kellogg contends that an agency subpoena calling for the production of trade secrets cannot be enforced unless the information sought is relevant and unless the party seeking disclosure can make a clear showing of immediate need for the information requested.[11] It contends further than once the agency has established relevance and immediate need, the subpoenaed party has the burden of coming forth with "a substantial offer of less sensitive information to meet that need."[12] The agency then has the burden of showing that the offer is inadequate to meet its needs. Kellogg takes the position that the FTC has not met the requirement that it show an immediate need for the trade secrets nor has it demonstrated how the information offered by them is inadequate to meet its litigation needs. The FTC on the other hand takes the position that the statutes require only a showing of general relevance to the litigation by the FTC and do not require a showing of need, even where "trade secret" information is sought.[13]

[11] Appellants rely upon *Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964, 85 S.Ct. 1110, 14 L.Ed.2d 155 (1965), and *Hartley Pen Co.* v. *United States District Court*, 287 F.2d 324, 330-331 (9th Cir. 1961). These two cases involved trade secrets sought to be discovered in civil actions pursuant to the Federal Rules of Civil Procedure. Appellants also rely upon *F.T.C.* v. Tuttle, 244 F.2d 605 (2d Cir.), *cert. denied*, 354 U.S. 925, 77 S.Ct. 1379, 1 L.Ed.2d 1436 (1957), a subpoena enforcement proceeding brought by the FTC where the Court stated:

> That does not mean that "trade secrets and names of customers" may not be subpoenaed by the Commission in any proceeding or investigation under the Act. They may be subpoenaed in litigation in Federal Courts, if the information is relevant and necessary to the presentation of a case. 244 F.2d 616.

[12] Brief for appellant at 23.

[13] Appellees rely upon the statutory authorization for judicial enforcement of an agency subpoena found in 15 U.S.C. § 49, note 2, *supra*, and 5 U.S.C. § 555(d) which reads:

> (d) Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in

(Continued)

We find, however, that we need not decide which standard to [210] apply to enforcement of the FTC subpoena *duces tecum* in this case. We find that both the district court and the Administrative Law Judge applied a standard of both relevancy and need in connection with the subpoena in this case. Our extensive review of the proceedings before the Administrative Law Judge reveals that he accepted Kellogg's position that both relevance and need for the trade secrets had to be shown by the FTC before the subpoenaed trade secrets would be ordered. He ordered the FTC to establish such relevance and need. The FTC filed its statement of need. Kellogg replied and offered alternative and substitute information which it contended would meet the litigation needs of the FTC. The FTC replied with a statement in which it set forth its reasons why the alternative substitute information was inadequate. Oral argument was held and the Administrative Law Judge found that the FTC had demonstrated relevancy and need for the quantitative formulas and the brand cost data sought in specifications I.10 and II.10 of the subpoena. As quoted herein, the district court found that the FTC had shown both relevancy and need in connection with its subpoena in this case. We have reviewed the record and find nothing therein which lends any support to a determination that the district court erred in ordering the enforcement of this subpoena.[14]

PROTECTIVE ORDER

[2] Kellogg also contends that the district court abused its discretion in enforcing the subpoena calling for the production of its trade secrets without issuing an appropriate protective order which would limit the disclosure of the individual brand cost data requested by specification II.10 of the subpoena to outside counsel. The order of the Administrative Law Judge directing Confidential B treatment for the individual brand cost data allows for disclosure of the cost data to all counsel of record, including inside or house counsel who were counsel of record. Kellogg argues that the individual cost data is a particularly sensitive trade secret and that its disclosure would be of inestimable value to Kellogg's competitors in that it would permit competitors to ascertain the profit margins of each of the individual Kellogg cereal products and thus enable Kellogg's competitors to take advantage of the

accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

The Supreme Court, in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 217 n.57, 66 S.Ct. 494, 90 L.Ed. 614 (1946), stated that the District Court must consider in an enforcement proceeding whether the documents sought by an administrative subpoena are relevant to the agency's inquiry. The judicial function in this regard is to be considered "neither minor nor ministerial."

[14] A finding by the district court that documents are relevant and necessary to an inquiry by the FTC is essentially factual in nature and cannot be overturned unless the district court's finding is clearly erroneous.

information either by concentrating their efforts in the areas of those Kellogg products which display the greatest profitability, or by seeking to undermine competition in those Kellogg products which have comparatively low profit margins. The FTC does not question that the quantitative formulas and the individual brand costs are trade secrets and confidential in nature.[15] It does contend however that Kellogg had an opportunity pursuant to the order of the Administrative Law Judge dated February 12, 1974 to request whatever confidential status it deemed appropriate and to suggest to the Administrative Law Judge the scope of the protective order to be entered and that Kellogg requested Confidential B treatment, which request was honored by the Administrative Law Judge. Kellogg replies that the Administrative Law Judge had ruled prior to the issuance of his February 12, 1974 order that any protective order would include disclosure to all counsel of record, and would not be limited to outside counsel and that in his order of February 12, 1974, the Administrative Law Judge limited Kellogg to selection of either Confidential A or Confidential B status.

It is difficult for us, on the basis of this record, to accept the argument of capable Kellogg counsel that they thought that they were limited by the prior orders of the Administrative Law Judge as to the alter[211]natives available to them for a protective order. The February 12, 1974 order of the Administrative Law Judge directed all counsel seeking limited disclosure "to submit their proposals for the type of disclosure warranted and for all counsel to be given an opportunity to respond to such proposals." (J.A. 257). There is nothing in this record which suggests that counsel for Kellogg were restricted in any way as to the alternatives available for a protective order. As the Administrative Law Judge stated in his Order of April 23, 1974:

> Having found the documents necessary, I invited respondents to propose the treatment to be accorded them. Their responses were submitted and accepted in my March 20, 1974, order. If something less could have satisfied complaint counsel's needs, it was incumbent upon respondents to propose it. Not having done so it ill becomes them to complain that I failed to allow some alternative to full disclosure. (J.A. 300).

We see no abuse of discretion in limiting the disclosure of the individual brand cost data to counsel of record. Although this Court has previously commented that there may be some distinction between disclosure of trade secrets to house counsel, and outside counsel,[16] we find no abuse of discretion in refusing to limit such disclosure in this case. In order to protect trade secrets, district courts have required appropriate protection as a precondition to enforcement of FTC

[15] Brief of Appellee at 9. See *Graber Mfg. Co.* v. *Dixon*, 223 F.Supp. 1020, 1022 (D.C.D.C. 1963), where the court recognized that information which would reveal the profitability of a firm's products should not be disclosed to competitors.

[16] *FTC* v. *Crowther*, 139 U.S.App.D.C. 137, 430 F.2d 510, 515 (1970).

subpoenas. *See, e. g., FTC* v. *St. Regis Paper Co.*, 304 F.2d 731, 732 n. 1 (7th Cir. 1962); *Graber Mfg. Co.* v. *Dixon*, 223 F.Supp. 1020 (D.C.D.C.1963); *FTC* v. *Bowman*, 149 F.Supp 624 (N.D.Ill.), *aff'd*, 248 F.2d 456 (7th Cir. 1957); *FTC* v. *Minzies*, 145 F.Supp. 164, 171 (D.Md.1956), *aff'd* 242 F.2d 81, 84 (4th Cir.), *cert. denied*, 353 U.S. 957, 77 S.Ct. 863, 1 L.Ed.2d 908 (1957). The decision as to the type and scope of any protective order rests within the sound discretion of the trial judge and must be determined on a case by case basis.[17] There is nothing in this record which would support a determination that the district court abused its discretion by its adoption of the protective order issued by the Administrative Law Judge.

The decision of the district court is affirmed.

Judgment accordingly.

[17] The same considerations apply to the disclosure of trade secrets in civil cases where discovery is sought pursuant to the Federal Rules of Civil Procedure *Covey Oil Company* v. *Continental Oil Company*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964, 85 S.Ct. 1110, 14 L.Ed.2d 155 (1965); *Hartley Pen Co.* v. *United States District Court*, 287 F.2d 324 (9th Cir. 1961).

FIRST NATIONAL CITY BANK et al., The CHASE MANHATTAN BANK et al., MELLON NATIONAL CORPORATION et al., MORGAN GUARANTY TRUST COMPANY et al.

v.

FEDERAL TRADE COMMISSION et al.*

Nos. 997, 1130, 1131, 1132, 1133; Docket Nos. 76-6019, 76-6023, 76-6026, 76-6027, 76-6035

F.T.C. File Nos. 99-253, 99-254, 99-255, 99-256, 99-258.

(United States Court of Appeals, Second Circuit, July 8, 1976)

RESOLUTION OF ISSUE OF PREENFORCEMENT PROCEEDINGS UNDER A.P.A. WAS UNNECESSARY WHERE BANKS' RIGHTS WOULD BE PROTECTED BY PROMPT DISPOSITION OF PRESENTLY PENDING ENFORCEMENT PROCEEDINGS.

Where rights of banks whose records had been subpoenaed by the FTC would be adequately protected by prompt disposition of enforcement proceedings presently pending, there was no need to resolve dispute as to whether preenforcement proceedings under the Administrative Procedure Act were permissible, and dismissal of preenforcement suit brought under that Act and the Declaratory Judgment Act would be affirmed.

(Syllabus, with substituted caption, taken from 538 F.2d 937)

On appeal from district court order, court held that a determination as to the permissibility of preenforcement proceedings under the APA was unnecessary, since prompt disposition of pending enforcement action would adequately protect banks' rights.

Dismissal affirmed.

John E. Hoffman, Jr., New York City, (*Shearman & Sterling*, New York City, *Herman E. Compter* and *Frederick A. Gertz*, of counsel), for plaintiffs-appellants.

Warren S. Grimes, Washington, D.C. (*Robert J. Lewis, Gerald P. Norton, Gerald Harwood*, and *William A. Horne*, of counsel), for defendants-appellees

Before MANSFIELD and VAN GRAAFEILAND *Circuit Judges*, and WARD, *District Judge*, of the Southern District of New York, sitting by designation.

VAN GRAAFEILAND, *Circuit Judge:*

[938] The provisions of the Federal Trade Commission Act, empowering the FTC to prevent corporations from using unfair

* Reported in 358 F.2d 937 (1976).

methods of competition and unfair or deceptive acts and practices, specifically exclude banks from the jurisdication thus granted. 15 U.S.C. § 45(a)(6). The investigative authority given to the FTC by § 6(a) and (b) of the Act, 15 U.S.C. § 46(a) and (b), also excludes banks from the class whose records are subject to examination.

However, subsection (h) of § 6, as amended in 1973, provides that the exception of banks from subdivisions (a) and (b) "shall not be construed to limit the Commission's authority to gather and compile information to investigate, or to require reports or answers from, any person, partnership, or corporation to the extent that such action is necessary to the investigation of any person, partnership, or corporation, group of persons, partnerships, or corporations, or industry which is not engaged or is engaged only incidentally in banking * * *" It is the interrelation of the above statutory provisions which has given rise to this litigation.

The FTC, presently engaged in a comprehensive study of this country's energy industry, is seeking to obtain information concerning the extent and effects of interlocking directorates between petroleum companies and financial institutions. On June 10, 1975 the FTC, purportedly acting pursuant to the power granted it by subdivision (h), issued subpoenas to appellants requiring broad disclosure of bank records.[1] Appellants promptly filed motions with the FTC to quash or limit the subpoenas, alleging that they exceeded the Commission's authority with respect to banks, were irrelevant to the energy industry investigation and were unreasonably burdensome. The Commission made some slight modifications in the subpoenas but denied the motions to quash. Appellants then brought suit in the Southern District of New York pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 702-05 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, seeking a declaratory judgment that the subpoenas were in excess of the delegated powers of the FTC and beyond its investigative authority and jurisdiction.

The FTC, arguing that appellants' sole remedy was the resistance of enforcement proceedings brought pursuant to 15 U.S.C. § 49, moved to dismiss the complaints on the grounds that the court lacked subject matter jurisdiction and that plaintiffs had failed to state claims upon which relief could be granted. This appeal is from the order of Judge Frankel which granted defendants' motion.

Our disposition of the appeal has been facilitated by several events which have occurred since the motion to dismiss was filed in District Court. On December 19, 1975, the FTC instituted § 49 enforcement

[1] Among other things, the banks were required to produce all documents "memorializing" the meetings of their Boards of Directors, Executive Committees and Examining Committees, at which directors who were simultaneously directors of energy companies were present.

proceedings against appellants in the United States District Court for the District of Columbia, and these motions have been consolidated and transferred to the Southern District of New York. Counsel for the FTC has conceded on appeal that appellants' challenge to the subpoenas was made in good faith, so that there is no risk of criminal sanctions under 15 U.S.C. § 50 in the enforcement proceedings. The FTC has **[939]** also abandoned its contentions concerning lack of subject matter jurisdiction in the District Court.

Under the circumstances, appellants' rights will be adequately protected by prompt disposition of the enforcement proceedings presently pending in the Southern District. We see no need, therefore, to resolve the dispute between the parties as to whether appellants' pre-enforcement proceedings under the Administrative Proceedure Act are prohibited by holdings such as *Reisman* v. *Caplin*, 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964) or permitted by decisions such as *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

We affirm the order appealed from as an exercise of the District Court's discretion which is not clearly erroneous. Because this appeal could have been disposed of readily by stipulation, costs will not be assessed against either party.

UNITED STATES of America v. PAPERCRAFT CORPORATION*

No. 75-2052. F.T.C. Docket No. 8779.

(United States Court of Appeals, Third Circuit, July 9, 1976)

1. WITH REGARD TO DISTRICT COURT'S DETERMINATION OF MAXIMUM PENALTY APPLICABLE FOR VIOLATION OF F.T.C. DIVESTITURE ORDER, COURT OF APPEALS' SCOPE OF REVIEW WAS PLENARY.

   Court of Appeals' scope of review of district court's determination of maximum penalty applicable for violation of Federal Trade Commission corporate divestiture order was plenary.

2. FOR CALCULATING PENALTY TO BE IMPOSED, COURT OF APPEALS WAS IN AS GOOD A POSITION AS DISTRICT COURT TO DETERMINE ISSUE AS TO DATE OF DIVESTITURE ORDER VIOLATION.

   Court of Appeals was in as good a position as district court to determine issue as to date of violation of Federal Trade Commission corporate divestiture order for [132] purposes of calculating penalty to be imposed for such violation.

3. ONLY WHERE DETERMINATIONS WERE ARBITRARY OR CAPRICIOUS, FINDINGS WERE ERRONEOUS, OR IDENTIFICATION AND APPLICATION OF RELEVANT CRITERIA WERE IN ERROR COULD COURT OF APPEALS UPSET DISTRICT COURT'S DETERMINATION OF TOTAL PENALTY TO BE ASSESSED.

   As to issue of amount of total penalty to be assessed for violation of Federal Trade Commission corporate divestiture order, Court of Appeals could upset district court's determinations only if they were arbitrary or unreasonable or if there was error in the identification and application of relevant criteria or clearly erroneous findings of fact.

4. IN CASES OF STATUTORY CONSTRUCTION OR INTERPRETATION, EVEN WHERE LEGISLATIVE INTENT IS NOT CLEARLY DISCERNIBLE, JUDICIAL FUNCTION IS TO DETERMINE SUCH INTENT.

   Judicial function in cases of statutory construction or interpretation is to discern intent of legislature; this judicial duty obtains even where there is no clear manifestation of such intent.

5. IN COMBATTING UNFAIR METHODS OF COMPETITION OR DECEPTIVE PRACTICES, F.T.C. IS NOT RESTRICTED TO ONLY THOSE CONDEMNED BY ANTITRUST LAWS.

   Federal Trade Commission, in combatting unfair methods of competition or deceptive practices, is not limited to those methods or practices condemned by letter or spirit of anti-trust laws.

6. ALTHOUGH CERTAIN SECTIONS OF F.T.C. ACT AND CLAYTON ACT APPEAR TO BE OF SIMILAR CONSTRUCTION, THEY SHOULD NOT BE READ IN PARI MATERIA.

   Section of Clayton Act vesting Federal Trade Commission with authority to enforce sections of Act, providing for judicial review of final agency orders and setting forth penalty for violation of agency order and section of Federal Trade

* Reported in 540 F.2d 131 (1976). For case before the Commission, see 78 F.T.C. 1353; *modified*, 79 F.T.C. 420.

Commission Act stating general procedure governing unfair competition or deceptive practice proceeding, providing for judicial review of final FTC order and setting forth penalty for violation of order constitute separate and distinct weapons in Government's antitrust arsenal and should not be read in pari materia.

7. AMENDMENT TO F.T.C. ACT INCREASING PENALTIES FOR VIOLATION OF FINAL AGENCY ORDER FROM $5000 TO $10,000 DOES NOT INCREASE AMOUNT OF PENALTIES FOR VIOLATIONS OF CLAYTON ACT ORDERS.

1973 Amendment to the Federal Trade Commission Act setting penalty of not more than $10,000 a day for each violation of a final Federal Trade Commission order does not supersede so much of Clayton Act as sets the maximum daily civil penalty for violation of FTC order under Clayton Act at $5,000.

8. WHERE PENALTIES WERE ASSESSED FOR VIOLATION OF CLAYTON ACT AMOUNT ASSESSED COULD NOT BE SET BY MAXIMUM PENALTY ALLOWED UNDER THE F.T.C. ACT.

Where Federal Trade Commission adjudicated that corporation's acquisition of subsidiary violated Clayton Act and entered divestiture order, civil penalty imposed against corporation for violation of divestiture order had to be assessed with reference to maximum penalty permitted by the Clayton Act, not with reference to maximum penalty permitted by the Federal Trade Commission Act.

9. WHERE F.T.C. DID NOT GRANT OR DENY EXTENSION OF TIME TO COMPLY WITH DIVESTITURE ORDER, CIVIL PENALTY HAD TO BE ASSESSED FROM THE DATE DIVESTITURE WAS ORDERED.

Even though Federal Trade Commission did not deny corporation's application for extension of time to comply with FTC divestiture order, in that FTC did not grant the extension, civil penalty to be imposed upon corporation for violation of divestiture order had to be assessed from date the FTC ordered corporation to divest itself of subsidiary.

10. ASSESSED PENALTY, WITHIN STATUTORY MAXIMUM, NEED NOT BE VACATED MERELY BECAUSE IT EXCEEDED THE LARGEST PENALTY PREVIOUSLY IMPOSED FOR VIOLATION OF FTC ORDER.

Vacation of penalty assessed against corporation for violation of Federal Trade Commission divestiture order, a penalty within statutory maximum, was not required because it exceeded the largest penalty previously assessed for violation of FTC order.

11. FACTORS SUCH AS PUBLIC INJURY, GOOD OR BAD FAITH OF DEFENDANTS, AND ABILITY TO PAY SHOULD PROVIDE BASIS FOR AMOUNT OF PENALTY TO BE IMPOSED.

Size of penalty to be imposed for violation of Federal Trade Commission divestiture order should be based on number of factors including good or bad faith of defendants, injury to public and defendants' ability to pay.

12. EQUATING PROFIT WITH EXTENT OF PUBLIC HARM IN DETERMINING AMOUNT OF PENALTY TO BE IMPOSED DID NOT ABUSE DISCRETION OF DISTRICT COURT.

District Court in determining amount of penalty to be imposed upon corporation [133] for violation of Federal Trade Commission corporate divestiture order did not abuse its discretion in equating corporation's profit with extent of public harm caused by violation of order.

(Syllabus, with substituted captions, taken from 540 F.2d 131)

On appeal, court held that in equating firm's profits with the extent of public injury, trial court did not abuse its discretion; that penalty was assessable from the date of the divestiture order; and that such penalty must be assessed with reference to the maximum permitted by the Clayton Act, not the Federal Trade Commission Act, where Commission adjudicated that the acquisition violated the Clayton Act.

Reversed and remanded.

Abe Fortas, Fortas & Koven, Ian D. Volner, Cohn & Marks, Washington, D.C., *J. Tomlinson Fort, James H. Hardie,* Pittsburgh, Penn., *Eric F. Stoer,* Washington, D.C., *Reed Smith Shaw & McClay,* Pittsburgh, Penn., for appellant.

Thomas E. Kauper, Asst. Atty. Gen., *Robert B. Nicholson, Robert J. Wiggers,* Attys., Department of Justice, Washington, D.C., for appellee, *Joseph J. Gercke,* Assistant Director, Bureau of Competition, *Wayne E. Kaplan, Ronald Baylor Rowe, William L. Haynes,* Attys., Federal Trade Commission, Washington, D.C., of counsel.

Before ALDISERT, GIBBONS and GARTH, *Circuit Judges.*

OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

This appeal requires us to review a civil penalty assessed against Papercraft Corporation for failure to comply with a divestiture order of the Federal Trade Commission. The district court set the penalty at $7,500 for each of 509 days of determined noncompliance—for a total penalty of $3,817,500.[1] We reverse and remand.

I.

As the case comes to us, the historical facts are not in dispute. In late 1967, Papercraft acquired the stock of CPS Industries, Inc. In 1969, the FTC issued a complaint alleging that the acquisition violated § 7 of the Clayton Act, 15 U.S.C. § 18. Ultimately, the Commission found that CPS had been the largest and Papercraft had been the second largest manufacturer in the gift-wrap industry, and that the acquisition, resulting in a combined market share of 22 percent in an industry tending toward concentration, had eliminated substantial competition in violation of the Act. The FTC therefore ordered Papercraft to divest CPS and enjoined Papercraft from acquiring interests in any gift wrapping concern for a period of 10 years. Papercraft petitioned the United States Court of Appeals for the Seventh Circuit for review. The court, per then-Judge Stevens, modified the FTC order but, for all

[1] The district court's opinion granting summary judgment for the United States is reported at 393 F.Supp. 408 (W.D.Pa.1975); the court's opinion setting the penalty is reported at 393 F.Supp. 415 (W.D.Pa.1975).

purposes here relevant, affirmed. *Papercraft Corp.* v. *FTC*, 472 F.2d 927 (7th Cir. 1973).

Some five months after the decision of the Seventh Circuit, the FTC issued its amended order, requiring divestiture within six months of service of the order on Papercraft, *i. e.*, by December 16, 1973. For various asserted reasons, including poor market conditions, Papercraft did not divest by December 16, 1973.

By letter dated December 3, 1973, however, the company requested a nine-month extension from the Commission. The FTC responded by letter dated January 16, 1974. This letter related:

> The Commission, for lack of a majority vote, has not granted your request for an extension of time, and advises that Papercraft is under a continuing obligation to divest the CPS facilities as required by the order.
>
> The Commission further notes that the methods and objective of compliance efforts have been unsatisfactory. You are directed to consult the Compliance staff for further direction.

Appendix at 95 [hereinafter cited as App.]

Papercraft thereafter filed a second request for an extension of time,[2] stating, *inter alia*, "[t]he Commission has not proceeded against Papercraft because of the expiration of time originally allowed for divestiture and we know of no present intention on the part of the Commission to do [134] so." App. at 97. By letter dated March 29, 1974, the Commission denied this request and said:

> You are hereby advised that it is the Commission's opinion that Papercraft Corporation is in violation of the provisions of the order in the captioned matter. Papercraft Corporation is further advised that it has a continuing and immediate obligation under the order to effectuate the required divestiture. The Commission's right to seek enforcement of the order through a civil penalty or contempt proceeding for any past, present, future or continuing violation of the order is hereby expressly reserved.

App. at 108.

Papercraft continued to be unable or unwilling to divest. Accordingly, on August 27, 1974, the Department of Justice commenced the instant action in the Western District of Pennsylvania seeking a mandatory injunction of divestiture and the maximum daily civil penalty for noncompliance with an FTC order—$10,000. 15 U.S.C. §45(*l*).

The district court granted the government's motion for partial summary judgment on the issue of Papercraft's violation of the FTC order. 393 F.Supp. 408 (W.D.Pa. 1975). After conducting a hearing on the amount of the penalty to be assessed, the court determined: that it could assess a penalty of up to $10,000 a day, pursuant to the FTC Act,

[2] The request was dated February 27, 1974 but was not received until March 4, 1974.

notwithstanding that the original complaint issued under the Clayton Act; that "the penalties must be sufficient to (1) eliminate the benefit which Papercraft has had through its failure to divest CPS; (2) compel it to divest; and (3) create a deterrent to further delay in compliance, so that others will not choose a like course in the future";[3] that Papercraft did not exercise "good faith" in seeking to divest; and that Papercraft's profits from the retention of CPS had to be disgorged, both as a measure of the injury to the public and as a discouragement to potential future violators of divestiture orders. The court concluded:

> In considering Papercraft's financial ability to pay, and the harm caused by the delay, the degree of bad faith, and the benefit received by Papercraft, we do not think that the penalty assessed should be the maximum, however, it must be large enough to deter Papercraft and anyone else in the future from showing as little concern as Papercraft did for the need to meet the FTC timetable.
>
> A penalty of $7,500 a day is determined to represent a fair consideration of all of the factors involved, for a total of $3,817,500.[4]

On appeal,[5] Papercraft presses three basic contentions. First, it argues that the district court erred in assessing penalties under the FTC Act, which has a maximum daily fine of $10,000, rather than under the Clayton Act, which has a maximum daily fine of $5,000. Second, Papercraft urges that the district court erred in using December 16, 1973 as the date from which to calculate the penalty. Third, Papercraft argues that the district court erred in applying the relevant criteria to fix the daily penalty at $7,500. Specifically, the company contends that the court erred in its considerations of the "public interest" and of "good faith", and that it "relied upon clearly erroneous findings, reasoning and conclusions as to Papercraft's 'profits' and their relevance". Appellant's Brief at 16–17.

We will treat these arguments seriatim.

II.

Before delving into the three tendered issues, we deem it helpful to emphasize exactly what is before us, and the standards that govern our review.

[135] We are not here concerned with whether Papercraft did violate the Clayton Act. The Seventh Circuit opinion is controlling on that score for purposes of this appeal.

Nor are we confronted with a question as to whether Papercraft violated the divestiture order. The district court granted summary

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[3] 398 F.Supp. at 420.

[4] *Ibid.* at 427.

[5] Although immaterial to our decision, we note that Papercraft has informed the court by brief that, since docketing this appeal, Papercraft has completed divestiture of CPS. "An agreement to sell the stock was executed on November 26, 1975. It was filed with the Commission on December 5, 1975, and was formally approved on February 3, 1976." Reply Brief at 2.

judgment on the issue of noncompliance. Of course, the order was interlocutory in nature. On this appeal from final judgment, however, Papercraft does not contest the district court's resolution of liability.

Rather, this appeal is limited to issues concerning the *penalty* for violation of the divestiture order. Specifically, we are concerned with the *maximum penalty* applicable, the *date* from which that penalty should be calculated, and the *amount* of the total penalty assessed in light of several factors.

[1] The maximum penalty issue turns on whether the district court applied the proper provision of law—on whether it chose the proper legal precept. *See generally* R. Aldisert, The Judicial Process 464–92 (1976). Accordingly, our scope of review is plenary.

[2] The date issue depends on a factual determination of *when* Papercraft violated the divestiture order. The narrative or historical facts are not in dispute and what amounted to a violation is a question of law. Thus, we are in as good a position as the trial judge to consider it.

[3] With respect to the amount issue, the Supreme Court has instructed:

> [T]he District Court has discretion to determine the amount of the penalty for each violation whether the transactions are construed as single or as continuing violations. Thus, while totaling the penalty as a series of daily violations rather than as a single violation could raise substantially the total penalty assessed, the statutory scheme does not require that result, and the trial judge's determination would prevail in the absence of an abuse of discretion.

United States v. *ITT Continental Baking Co.*, 420 U.S. 223, 229 n. 6, 95 S.Ct. 926, 931, 43 L.Ed.2d 148 (1975). Thus, on the amount issue, we may upset the district court's determinations if we conclude that they are arbitrary or unreasonable, or if we find error in the identification and application of relevant criteria or clearly erroneous findings of fact. *See Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, (3d Cir., 1976) (en banc); *Merola* v. *Atlantic Richfield Co.*, 493 F.2d 292, 295 (3d Cir. 1974).

III.

The maximum penalty issue is easily stated: If the FTC adjudicates that a company's acquisition of another firm violates § 7 of the Clayton Act, and if the acquiring company violates an FTC order of divestiture, should the penalty be assessed with reference to the maximum permitted by the Clayton Act, 15 U.S.C. § 21(*l*),[6] or with reference to

[6] Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil

(Continued)

the maximum permitted by the FTC Act (FTCA), 15 U.S.C. § 45(*l*)?[7]

Prior to 1973, this question would have held academic interest, at best, for the max[136]ima were identical—$5,000 for each violation. See notes 6–7 *supra*. In 1973, however, and as a result of a rider to the Trans-Alaska Pipeline Authorization Act,[8] Congress increased the maximum penalty under the FTCA for each violation to $10,000. In this case, therefore, the question bears a price tag of more than one million dollars.

The district court's treatment of the issue was abbreviated:

> The Government's suit was brought under both the Federal Trade Commission Act and the Clayton Act. Section 45(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*) authorized a penalty of not more than $5,000 for each violation. Under Section 11(*l*) of the Clayton Act, 15 U.S.C. § 21(*l*) a penalty of not more than $5,000 for each violation was established. The maximum penalty for violation of Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), has since been increased from $5,000 to $10,000. *See*, Pub.L. 93–153, Title IV, § 408(c), 87 Stat. 591, 592 (1973). These statutes must be read *in pari materia*. *Federal Trade Comm'n* v. *Cement Institute*, 333 U.S. 683, 690, 68 S.Ct. 793, 92 L.Ed. 1010 (1948); *Federal Trade Comm'n* v. *Reed*, 243 F.2d 308 (7th Cir. 1957). Thus, maximum penalties of $10,000 per day are available as contended for by the Government. 393 F.Supp. at 417–18 (footnotes omitted). We are constrained to take a closer look at the statutory schema.

[4] At the outset, we observe that we decline the invitation of the parties to engage in a war of competing canons of statutory construction. By now, it should be clear that no single canon should operate with talismanic effect. *See* Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 Vand.L.Rev. 395, 401–06 (1950). Rather, the judicial function in cases of statutory construction or interpretation is to discern the intent of the legislature. *See Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 96 S.Ct 1938, 48 L.Ed.2d 434 (1976). *See also* Murphy, *Old Maxims Never Die, The "Plain-Meaning*

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action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense.

[7] At present, 15 U.S.C. § 45(*l*) provides:

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission. Prior to a 1973 amendment, 15 U.S.C. § 45(*l*) provided:

Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.

[8] Federal Lands Right-of-Way Act of 1973, Pub.L. No. 93–153, 87 Stat. 576.

Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 COLUM.L.Rev. 1299 (1975). This judicial duty obtains even when there is no clear manifestation of such intent. *Brown* v. *General Services Adm'n*, 425 U.S. 820, 96 S.Ct 1961, 1964, 48 L.Ed.2d 402 (1976);[9] *United States* v. *Bornstein*, 423 U.S. 303, 309, 96 S.Ct. 523, 46 L.Ed.2d 514, 44 U.S.L.W. 4078, 4080 (1976).

A.

Section 7 of the Clayton Act prohibits one corporation engaged in commerce from ac[137]quiring the stock or, if the corporation is subject to FTC jurisdiction, the assets of another corporation also engaged in commerce where the effect of such an acquisition may be substantially to lessen competition or tend to create a monopoly. 15 U.S.C. § 18. Section 11 of the Clayton Act vests certain federal regulatory agencies— specifically, the Interstate Commerce Commission, the Civil Aeronautics Board, the Federal Communications Commission, the Federal Reserve Board and the FTC—with authority to enforce enumerated sections of the Clayton Act, including § 7. 15 U.S.C. § 21(a), (b). Section 11(b) prescribes the procedures by which the regulatory agencies initiate and prosecute such Clayton Act adjudications. 15 U.S.C. § 21(b). Section 11(c) provides for judicial review of final agency orders from such adjudications. 15 U.S.C. § 21(c). Section 11(*l*) sets forth the penalty for violation of a final agency order under § 11(b). 15 U.S.C. § 21(*l*); see note 6 *supra*. Thus, on its face, § 11 establishes a mechanism for agency adjudication of Clayton Act violations that appears both thorough and complete—providing authority to act, guidelines for processing the charges, rules for determining finality of orders, and penalties for violations of final orders.

[5] Congress enacted the Federal Trade Commission Act in 1914 to supplement the general antitrust laws. *FTC* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 453, 42 S.Ct 150, 66 L.Ed. 307 (1922). The heart of the new Act was § 5 which declared unlawful "unfair methods of competition"[10] and empowered the Commission to obtain cease and desist orders. At first, the exact role of the FTC in the constellation of antitrust law was uncertain. *FTC* v. *Gratz*, for example, held that the words "unfair method of competition" were "clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder

[9] "Congress simply failed explicitly to describe [the position of § 717 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16] in the constellation of antidiscrimination law. We must, therefore, infer congressional intent in less obvious ways. As Chief Justice Marshall once wrote for the Court, '[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived * * *.' *Fisher* v. *Blight*, 2 Cranch 358, 386 (1805)."

[10] Section 5 now extends also to "unfair or deceptive acts or practices". 15 U.S.C. § 45(a)(1).

competition or create monopoly." 253 U.S. 421, 427, 40 S.Ct. 572, 575, 64 L.Ed. 993 (1920). Eventually, however, the dissenting views of Mr. Justice Brandeis prevailed. *See FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239–44, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972). Accordingly, it is now settled that the Commission, in combatting "unfair methods of competition" or "deceptive practices", is not limited to those methods or practices condemned by the letter or spirit of the anti-trust laws. *Ibid.* at 244, 92 S.Ct. 898; *FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 320–21, 86 S.Ct. 1501, 16 L.Ed.2d 587 (1966); *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394–95, 73 S.Ct. 361, 97 L.Ed. 426 (1953).

Section 5 of the FTCA tracks the format of § 11 of the Clayton Act. Thus, § 5(b) states the general procedure governing an unfair competition or deceptive practice proceeding, § 5(c) provides for judicial review of a final FTC order under § 5, and § 5(*l*) sets forth the penalty for violating a final FTC order. 15 U.S.C. § 45(b),(c),(*l*). On its face, then, § 5 establishes a mechanism for the FTC to police "unfair methods of competition" and "unfair or deceptive acts or practices", which, like the Clayton Act § 11 mechanism, appears to be complete and self-contained.

While the parallelism of the subsections within the statutes is remarkable, several differences command our attention. First, § 11(b) provides that, if the agency is of the view that the Clayton Act has been violated, it "shall issue and cause to be served on such person an order requiring such person to *cease and desist* from such violations, *and divest* itself of the stock, or other share capital, or assets, held * * * in the manner and within the time fixed by said order." 15 U.S.C. § 21(b) (emphasis added). The comparable provision in the FTCA states that if the FTC finds an unfair method of competition or deceptive practice, it "shall issue and cause to be served on such person * * * an order requiring such [138] person * * * to *cease and desist* from using such method of competition or such act or practice." 15 U.S.C. § 45(b) (emphasis added).

The other differences relate to the penalty sections. Compare notes 6 and 7 *supra*. The Clayton Act provides a maximum penalty of $5,000 for each violation of an order under subsection (b). The FTCA formerly provided for an identical $5,000 penalty for each violation of a final cease and desist order. The current subsection (*l*), however, provides a $10,000 maximum for each violation of "an order of the Commission after it has become final", without explicit limitation to cease and desist orders. Amended subsection (*l*) also empowers the district courts to grant mandatory equitable relief in furtherance of FTC orders. A final distinction is that the 1973 amendments to the FTCA added a subsection (*m*), empowering the FTC, when authorized to appear in

court, to appear in its own name upon giving the Attorney General 10 days notification of its intent so to do. This distinction has no bearing on this case, however, which was brought by the United States.[11]

[6] Based on a careful review of the statutory schema prior to the 1973 FTCA amendments, we believe that Clayton § 11 and FTCA § 5 constituted separate and distinct weapons in the government's antitrust arsenal.[12] The FTC could choose to employ either in appropriate circumstances. Once having selected the statute under which to act, however, the Commission would have recourse to the same statute for enforcement.[13]

In this case, the FTC moved against Papercraft under Clayton § 11 and obtained a final order of divestiture which, in relevant part, the Seventh Circuit affirmed. We must now decide whether the 1973 amendments altered the rules under which the FTC could seek enforcement of its final order. Specifically, we must decide whether § 408(c) of the Alaska Pipeline bill—which amended § 5(*l*) of the FTCA by increasing the penalty from $5,000 to $10,000 and by eliminating the words "to cease and desist"—implicitly repealed or superseded so much of Clayton § 11(*l*) as set the maximum penalty for violation of an FTC order under Clayton § 11(b) at $5,000. Accordingly, we turn to an analysis of the legislative history of the 1973 FTCA amendments.

B.

In 1973, the United States experienced unprecedented peacetime natural gas and oil shortages. In some quarters, the "energy crisis", as it came to be known, was thought a deliberate contrivance on the part of the major oil companies to drive small independent operators out of business and thereby increase the dominance of the major firms. *See* 119 Cong.Rec. 21443 (1973) (remarks of Senator Jackson). The staff of Senator Henry M. Jackson, chairman of the Committee on Interior and Insular Affairs, corresponded with the staff of [139] the FTC about the latter's ability "to deal with situations comparable to the [then-] current petroleum emergency." *Ibid.* at 21445 (letter from FTC general counsel Ronald M. Dietrich to Senator Jackson). The FTC indicated

[11] The hasty adoption of subsection *m* in 1973, see *infra*, caused some confusion as to the appropriate roles of the FTC and the Department of Justice. Accordingly, subsection *m* was amended in 1975. H.R.Rep.No.93–1107, 93d Cong. 2d Sess., 1974 U.S.Code Cong. & Admin.News 7702, 7731–32; *see* S.Conf.Rep. No.93–1408, 93d Cong., 2d Sess., 1974 U.S. Code Cong. & Admin.News 7755, 7770–71. That provision, however, is not relevant to this appeal, for this action was commenced in 1974 and the 1975 amendments do not apply to any action commenced before the date of enactment, Jan. 4, 1975. Pub.L.No.93–637, § 204(c), 88 Stat. 2199.

[12] Thus, we disagree with the district court's statement that the statutes treat the same subject matter and therefore must be construed together, *i.e.*, that they are *in pari materia*. *See* Black's Law Dictionary 936 (3d ed. 1933). Their similarity is confined to the most generic sense.

[13] Our conclusion in this important respect is buttressed by the realization that Clayton Act § 11 differs significantly from other statutes which, while empowering the FTC to act in certain fields, specifically incorporate the enforcement provisions of the FTCA. *See, e.g.*, Textile Fiber Products Identification Act, 15 U.S.C. § 70e; Flammable Fabrics Act, 15 U.S.C. § 1194; Truth in Lending Act, 15 U.S.C. § 1607.

that its powers were broad enough to discover such problems in their incipiency, but that the shortcomings of the FTC's power were "in the potential for delay in existing subpoena enforcement procedures and in [the FTC's] inability to obtain preliminary relief once the problem has been fully discovered." *Ibid.* Accordingly, the FTC sought "statutory authority to seek directly in the federal district courts preliminary injunctions against the continuance of anticompetitive conduct ('unfair methods of competition') as well as deceptive practices, and the corresponding statutory authority to proceed to federal district court itself to enforce its own subpoenas and to require reports from businesses under Section 6(b) of the Federal Trade Commission Act." *Ibid.*

The consequence of the above described correspondence was S. 2074, styled "a bill to amend the Federal Trade Commission Act in order to grant the Commission authority to directly enforce subpoenas issued by the Commission and to directly seek preliminary injunctive relief to avoid unfair competitive practices which violate laws enforced by the Commission." *Ibid.* at 21435.[14] S. 2074 was referred to committee on June 26, 1973. Shortly thereafter, however, Senator Jackson offered the substance of the bill as an amendment to the then-pending Trans-Alaska Pipeline bill. Without debate, the Senate overwhelmingly agreed to the amendment as offered on July 10, 1973. *Ibid.* at 22981.

The House version of the Pipeline bill contained no cognate to the Senate FTCA amendments.[15] The joint conference adopted the Senate version. When the conference bill was called for debate in the House, opposition to the FTCA amendments focused not so much on the merits of the measures as on the propriety of accepting "non-germane amendments" which had not been subjected to full scrutiny in the House. *See generally ibid.* at 36595–36618.

Supporters of the bill in the House emphasized the benefits that would accrue to consumers and small businessmen from having an FTC capable of taking speedy action against unfair competitive practices. *See ibid.* at 36596–97 (remarks of Representative Melcher); *ibid.* at 36608 (remarks of Representative Smith); *ibid.* at 36616 (remarks of Representative Holtzman); *ibid.* at 36618 (remarks of Representative Gude). The FTCA amendments were denominated "housekeeping improvements". *Ibid.* at 36612 (remarks of Representative Dingell). Section 408(c), the section increasing the maximum civil penalty, was described as more "in the nature of a *modernization rather than a*

[14] At a news conference while the proposal was pending, Senator Jackson reiterated that the purpose of the bill was to empower the FTC to go to court for subpoena enforcement and preliminary injunctive relief. "This authority will circumvent the delays experienced in the past when the Commission was required to request and persuade the Justice Department to go to Federal Court on the Commission's behalf." 119 Cong.Rec. 22980 (1973).

[15] Representative Dingell had introduced a bill, H.R. 5847, to amend the Federal Trade Commision Act by providing for "temporary injunction or restraining orders for certain violations of that Act." 119 Cong.Rec. 8674 (1973). The House bill, however, was not reported from the Committee on Interstate and Foreign Commerce.

revision, made necessary by twenty-five years of inflation since the $5,000 limit was prescribed in 1938. The provision in no way affects the Commission's substantive authority." *Ibid.* at 36609 (remarks of Representative Johnson) (emphasis added).

Our review of the available legislative materials leads us to the following deductions. In passing the 1973 FTCA amendments, Congress was concerned with two problems: (1) increasing the Commission's ability to deal quickly with incipient unfair methods of competition and deceptive practices, and (2) providing the Commission with a means of enforcing its requests for vital information. The only evidence of the [140] congressional intent in increasing the maximum daily civil penalty indicates that that amendment was technical, not substantive—necessitated by 25 years of inflation since the last legislative action with respect to the FTC penalty.

[7] Far from evincing a clear legislative intent that the amended FTCA § 5(*l*) supplant Clayton § 11(*l*)'s enforcement provision for violations of FTC orders under Clayton § 11(b), the history of the 1973 FTCA amendments reflects hasty congressional action. Passage of the Pipeline authorization bill—viewed as a potential means to alleviate national dependence on foreign oil—was the primary concern. Increasing the FTC's powers was a subsidiary concern, and was limited to the above-enumerated areas. We conclude therefore that the 1973 amendment to FTCA § 5(*l*) did not supersede so much of Clayton Act § 11(*l*) as sets the maximum daily civil penalty for violation of an FTC order under Clayton Act § 11(b) at $5,000.[16]

[8] The FTC successfully challenged Papercraft's acquisition of CPS under Clayton Act § 11(b). In seeking civil penalties for violation of the resultant divestiture order, the Commission was authorized to proceed under Clayton Act § 11(*l*). Accordingly, we hold that the district court erred when it assessed Papercraft's penalty with reference to FTCA § 5(*l*)'s maximum of $10,000 per violation.[17]

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[16] Mindful that "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage," *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132, 95 S.Ct. 335, 353, 42 L.Ed.2d 320 (1974), we note in passing that in this case post-passage congressional studies only serve to bolster our view of the congressional intent behind the 1973 FTCA amendments. *See* S.Conf.Rep.No.93-1408, 93d Cong.,2d Sess., 1974 U.S.Code Cong. & Admin. News 7755, 7771-72; H.R.Rep.No.93-1107, 93d Cong., 2d Sess., 1974 U.S.Code Cong. & Admin. News 7702, 7713-14, 7716.

[17] The government suggests that an interpretation such as that we reach would be incongruous, permitting only a $5,000 penalty for a full-blown anti-trust violation, but a $10,000 penalty for a violation of the broader FTCA § 5. The short answer, of course, is that this result is not incongruous if, as we have found, Congress so intended. Nor is such an intent unreasonable. For instance, Congress might determine that there should be a $10,000 penalty for violating cease and desist orders which, by and large, are capable of prompt compliance; on the other hand, Congress might determine that the $5,000 figure should obtain for violations of divestiture orders under the Clayton Act, because divestiture cannot be accomplished overnight. Lastly, the government's argument itself leads to an incongruity, for it would permit the FTC to collect $10,000 for each violation of an order stemming from Clayton Act § 11, but relegate the ICC, the FCC, the Federal Reserve Board and the CAB, which agencies proceeded under the same statute, to penalties of $5,000 for each violation.

IV.

We need not belabor the date issue. The documents make plain that the FTC ordered Papercraft to divest itself of CPS by December 16, 1973. Papercraft failed to do so. The company, therefore, was guilty of a violation of the divestiture order each day it continued in its failure to divest, *unless* it obtained an extension from the FTC.

[9] Papercraft applied for an extension on December 3, 1973. No response was forthcoming until January 16, 1974. Thus, as Papercraft argues, the FTC did not deny the request for an extension. It is equally true, however, that the FTC did not grant the extension. In these circumstances, we deem it within the district court's authority to conclude that Papercraft violated the divestiture order when it failed to divest by December 16, 1973. Nothing in the subsequent correspondence between Papercraft and the FTC detracts from this view. Nor is this a case in which Papercraft argues that it received an informal extension of time in which to comply. Accordingly, we hold that the district court's conclusion as to the date from which to assess the penalty was not clearly erroneous.

Our holding on the maximum penalty issue requires that the proceedings be remanded to the district court. We deem it appropriate, therefore, to add certain suggestions which the district court will be free to accept or reject at its discretion. Our [141] review of this case leaves us with the impression that while Papercraft did not expend every effort it might have to achieve timely compliance, neither did the FTC exert maximum pressure on Papercraft to assure timely compliance. We reject appellant's contention that, as a matter of law, the FTC waived its right to seek enforcement and civil penalties between December 16, 1973 and March 29, 1974, or was estopped to do so.

Nevertheless, in these peculiar circumstances, we leave open to the district court various possibilities as to the imposition of penalties. That the district court originally did not impose the full maximum penalty of $10,000 per day may have been a recognition of the failure of the FTC to assure timely compliance. We leave to its discretion whether similarly the maximum daily penalty of $5,000 should not be imposed. Further, we recognize that the district court might be disposed toward imposing different daily penalties for the violations of the divestiture order—*i.e.*, one penalty might obtain for the period from December 16, 1973 to March 29, 1974, and another, higher one for the period after March 29, 1974.

V.

Papercraft attacks the amount of the penalty assessed from several angles.

[10] First, Papercraft argues that this penalty was "so enormous and so far beyond any precedent, that its size, in and of itself, raises doubt as to the soundness of the Court's exercise of its discretion in this case." Appellant's Brief at 36. That the largest penalty previously assessed in a divestiture case was $200,000 and that the largest penalty for violation of any FTC order was $465,000, *see ibid.*, are simply irrelevant considerations, given the statutory maximum and our scope of review. Appellant's arguments to the contrary are more properly addressed to the Congress.

[11,12] Next, appellant argues that while the district court identified the proper factors to be considered in assessing the civil penalty, viz., those articulated by Judge Friendly in *United States* v. *J. B. Williams, Co.*, 498 F.2d 414, 438–39 (2d Cir. 1974), it departed widely from the standards in purporting to apply them. We agree with Judge Friendly that "the size of the penalty should be based on a number of factors including the good or bad faith of the defendants, the injury to the public, and the defendants' ability to pay." *Ibid.* at 438. Papercraft argues, however, that the district court equated Papercraft's profits with the extent of the public harm. Papercraft argues that no case prior to this one measured public harm in this manner. That may be. While we need not decide the issue, we note that the Supreme Court last Term stated that "violations [of Clayton Act § 11(*l*) and FTCA § 5(*l*)] share two discernible characteristics: [1] the detrimental effect to the public and the advantage to the violator of each continues and increases over a period of time, and [2] the violator could eliminate the effects of the violation if it were motivated to do so, after it had begun." *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 231, 95 S.Ct. 926, 932, 43 L.Ed.2d 148 (1975). Thus, while no court assessing penalties previous to the district court equated public harm with the measure of the violator's profits during the violation, the Supreme Court appears to have made just such an equation. Accordingly, we cannot say the district court abused its discretion in this respect. Papercraft also challenges the district court's calculation of its profits. We need not inquire into this argument other than to note that in its opinion on the motion to reconsider, the district court observed that a substantial penalty was warranted in these circumstances, irrespective of profits. See App. at 206–08. We find that the district court did not abuse its discretion in its meticulous analysis on the "good faith" issue.

The judgment of the district court will be reversed and the cause remanded for further proceedings in accordance with the foregoing.

ITT CONTINENTAL BAKING CO., INC. v. FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 75–1218. F.T.C. Docket No. 9000.

(United States District Court, District of Columbia, July 9, 1976)

On Freedom of Information Act request for disclosure of F.T.C. documents, court held that investigatory material assembled for law enforcement purposes was exempt under the Act, and disclosure of these records would hinder discovery procedures, F.T.C.'s continuing investigation, and pending complaint proceeding.

Summary judgment granted in favor of the defendants, action dismissed.

John H. Schafer, Washington, D.C., for plaintiff.
Julius A. Johnson, Washington, D.C., for defendants.
Before ROBINSON, *District Judge.*

MEMORANDUM AND ORDER

Plaintiff brings this action under the Freedom of Information Act (FOIA) seeking from the Defendant Federal Trade Commission (FTC or Commission) access to certain documents which pertain to a currently pending complaint issued by the Commission against the plaintiff. The FTC has permitted plaintiff access to a portion of the file, but has refused as to the remaining documents on the grounds that all are exempt from disclosure under Exemption 7(A), or, alternatively, that various portions are exempt under Exemptions 4, 5 and 7(D), 5 U. S. C. § 552(b), 4, 5, 7(A) and 7(D). In an earlier Order dated March 16, 1976, the Court deferred ruling on the pending cross motions for summary judgment and ordered defendants to supplement both the index supplied and the evidentiary support for the exemptions claimed. This material has been submitted and reviewed by the Court and the Court concludes that the FTC is entitled to summary judgment on the grounds that all the documents requested are exempt from disclosure under Exemption 7(A).

In the index supplied, the defendants have divided the exempted documents into five categories. These groups are as follows:

Category A: intra-agency memoranda prepared by FTC staff regarding the pending action against plaintiff;

Category B: worksheets and working notes containing financial data and analysis relating to the FTC investigation of and agency proceeding against plaintiff;

Category C: numerous interview reports prepared by Commis-

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 60,968 at 69,209 (1976-2 Trade Cases).

sion staff attorneys during the investigation and in preparation for agency litigation against plaintiff;

Category D: one sales contract between plaintiff and a customer;

Category E: a variety of correspondence from the Commission's active investigatory file regarding the action pending against plaintiff.

In their threshold contention, the defendants claim that all of these documents are exempt from disclosure pursuant to Exemption 7(A) which permits nondisclosure of "investigatory records compiled for law enforcement purposes * * * to the extent that the production of such records would (A) interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). In an extensive affidavit filed in response to the Court's Order, the defendants justify their reliance upon Exemption 7(A) and set forth the reasons why disclosure of these documents at this time would substantially impair the ongoing proceeding against plaintiff.

There appears to be no dispute that these documents are "investigatory records compiled for law enforcement purposes." The issue for resolution by the Court is whether the defendants have demonstrated that disclosure of these documents at this time would "interfere with law enforcement proceedings." Upon review of the legislative history of this provision, relevant case law and the submission made by the defendants in this action, the Court is persuaded that the documents are appropriately withheld under Exemption 7(A).

Since the statutory language is rather sparse, it is appropriate to review the legislative history to ascertain which documents Congress intended to be included in this provision. Senator Hart, the sponsor of this amendment, stated at its introduction that:

> My reading of the legislative history [of the original FOIA] suggests that Congress intended that this seventh exemption was to prevent harm to the Government's case in Court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have. 120 Cong. Rec. 17033 (May 30, 1974).

And in an attempt to explain Exemption 7(A), the Senator made clear that it would apply "whenever the Government's case in court—a concrete prospective law enforcement proceeding—would be harmed by the premature release of evidence of information not in the possession of known * * * defendants." He also emphasized that nondisclosure under 7(A), would be appropriate whenever it was shown that disclosure "would substantially harm such proceedings by impeding any necessary investigation before the proceeding." *Id.*

Relying upon these quotations from the legislative history, the Second Circuit recently held that certain statements made by employees in the course of an unfair labor practice enforcement

proceeding were properly withheld from the respondent in that proceeding in reliance upon Exemption 7(A). *Title Guarantee Co.* v. *N. L. R. B.*, —F.2d—, No. 75–6119, (2nd Cir. April 2, 1976). The Court noted the absence in the legislative history of the FOIA of any indication that Congress intended the Act or its amendments to modify agency rules governing discovery in pending agency proceedings.

And in another recent decision, Judge Flannery of this Court noted the propriety of Exemption 7(A) to a case substantially similar to the one at hand, *Gifford-Hill & Co., Inc.* v. *F. T. C.* 1975–2 TRADE CASES ¶ 60,674 (D. D. C. January 13, 1976). That action also was brought by a party currently facing complaint charges before the FTC who sought access to the Commission's investigatory file. In denying the request, Judge Flannery stated:

> To grant the plaintiff earlier access to the transcript under FOIA would undermine the Commission's obviously fair discovery process, and to allow a private litigant, who is the object of the complaint before the Commission, to gain adversary advantage by means of this action simply would not fulfill the interests of informing the public contemplated by the Act. *Id*, at 67,945.

A review of the FTC's submission persuades the Court of the propriety of the application of Exemption 7(A) in this instance. The status of the pending agency proceeding should first be noted. A complaint was issued against the plaintiff in November, 1974. At the present time the case is in the discovery stage. Two post complaint administrative subpoenas to plaintiff have been issued; one has been answered but the other is outstanding. Following completion of the Commission's discovery, plaintiff will proceed with its discovery in accordance with the Commission's discovery rules, set forth at 16 C. F. R. §§ 3.31–3.39.

The present posture of the agency proceeding is an important increment of the FTC's argument that disclosure of these documents at this time would interfere with an ongoing proceeding. The Commission argues that permitting plaintiff access to many of these documents at this early stage of litigation would upset the normal balance of agency litigation and prematurely reveal the strategy of the Government's case by requiring disclosure of work product memoranda prepared by Commission staff in preparation for its case. In addition, since the discovery is still in progress, disclosure at this time would possible impede future, investigatory efforts by the Commission. Many of the witnesses and correspondents are competitors of plaintiff's, and the Commission fears economic retaliation which would possibly squelch anticipated cooperation in the Commission proceeding. The FTC emphasizes that many of the communicants have been assured confidential treatment and premature disclosure of their identity could

erode confidence in the Government's ability to protect its informants as promised.

As the Supreme Court has recognized, the FOIA was "fundamentally designed to inform the public about agency action and not to benefit private litigants." *N. L. R. B.* v. *Sears*, 421 U. S. 132, 143, n. 10 (1975), citing *E. P. A.* v. *Mink*, 410 U. S. 73, 79, 92 (1973); *Renegotiation Board* v. *Bannercroft Clothing Co.*, 415 U. S. 1, 24 (1974). It is clear that plaintiff will obtain access to necessary documents relevant to the pending proceeding before the Commission in accordance with the FTC's discovery rules. The Commission has persuaded the Court that to permit plaintiff access to the documents remaining in the investigatory file at this time would upset the normal discovery process and would, more importantly, impede the Commission's ongoing investigatory efforts and interfere with the pending complaint proceeding.

Since the Court has disposed of the entire matter based upon Exemption 7(A), there is no need to reach defendants' argument that the documents are also exempt from the FOIA under the other exemptions claimed. In addition, the Court has reviewed plaintiff's waiver argument, presented to the Court in a Memorandum dated February 23, 1976, and finds it more appropriately raised in the context of an Exemption 5 argument. The Court does not find it applicable nor persuasive in the context of Exemption 7(A).

Based upon the foregoing, it is this 9th day of July, 1976,

Ordered that Defendants' Motion for Summary Judgment be and hereby is Granted and this action be and hereby is Dismissed.

ASSOCIATION OF NATIONAL ADVERTISERS, INC. v. FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 75–1304. F.T.C. File No. 99–238.

(United States District Court, District of Columbia, July 15, 1976)

In a Freedom of Information Act action, court held that data relating to agency's deliberative process, including staff opinions, recommendations, and directions to consultants were exempt from disclosure, and the majority of deleted portions of documents were properly withheld by F.T.C. However, mailing lists, containing the names and addresses of persons sent material relating to proposed trade regulation rule, and the names and addresses of consultants, were discoverable, since their release would not constitute an unwarranted invasion of privacy.

Granted in part, and denied in part.

Stephen A. Weitzman, Washington, D.C., *Bruce R. Hafner,* New York City, for plaintiff.

Earl J. Silbert, U.S. Atty., *John R. Dugan,* Asst. U.S. Atty., Washington, D.C., for defendants.

Before JONES, *Chief Judge.*

MEMORANDUM

In this Freedom of Information Act case, plaintiff seeks access to thirty-seven documents which have been withheld, either in whole or in part, by the Federal Trade Commission. These documents are reasonably and particularly described in defendants' Index of Documents Partially or Fully Withheld from Plaintiff, and fifteen of the documents have been submitted to the Court for *in camera* inspection. The task presently before the Court involves resolution of three issues:

(1) Whether those documents or portions of documents which have been withheld in whole or in part because they allegedly contain recommendations, opinions, or advice of agency personnel, and which have been submitted for *in camera* inspection, were properly withheld under exemption 5;

(2) Whether the names and addresses of outside expert consultants can properly be withheld pursuant to exemption 5;

(3) Whether a mailing list of non-expert witnesses with whom the FTC staff communicated can properly be withheld pursuant to exemption 6.

Agency Memoranda

Treated under this section are Documents 1, 2, 3, 4, 5, 9, 15, 17, 18, 20, 22, 28, 30, 32 and 37, which have been submitted for *in camera*

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 61,021 at 69,491 (1976–2 Trade Cases).

inspection, and Documents 8, 19, 29 and 35, which were not requested by the Court.[1]

Exemption 5 protects from disclosure material which is privileged in the civil discovery context. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Judge Wilkey has aptly described the privilege normally invoked by the government in exemption 5 cases as the "common sense-common law privilege, i.e., the recognition that the Government cannot operate in a fish bowl." *Vaughn* v. *Rosen*, 523 F.2d 1136, 1146 (D.C. Cir. 1975). The Court must, within the context of each case, determine whether publication would inhibit "the frank discussion of legal and policy matters" within the agency or would otherwise cause "injury to the quality of agency decisions." *Sears, supra* at 150–51. Thus, seldom will agency material that does not include opinions, recommendations or deliberative ruminations about certain issues find protection within the "common sense-common law privilege" recognized by exemption 5. With these principles in mind, the Court has reviewed the fifteen documents submitted for *in camera* inspection, and with the certain exceptions, finds that the deleted portions fall within exemption 5.

Certain of the deletions cannot reasonably be defended as falling within the protection of exemption 5. In Document 1, paragraphs 3 and 4 simply relate certain administrative actions taken by the author's staff, disclose no opinions or recommendations or the deliberative process in general. Accordingly, these two paragraphs will be ordered disclosed. In Document 17, disclosure of the sentence deleted on the first page, an offhanded remark characterizing the questions worthy of discussion, can hardly result in diminution of the "quality of agency decisions." Therefore, it will be ordered disclosed. The only deletions in Document 18 which are justifiable are those under the column "effect of rule," which clearly disclose the deliberative process of the author. The random deletions under the columns "section" and "claim" do not represent the opinions or recommendations of the author, and clearly are not within the concept of deliberative process. Accordingly, all material in Document 18, with the exception of the heretofore deleted portions under the column "effect of rule," will be ordered disclosed. The deleted portion of Document 22 is simply a request by the author for permission to publish his remarks at a prior public meeting. To label such a request as opinion, recommendation, or deliberation would stretch exemption 5 far beyond its meaning. Therefore, the deletion in Document 22 will be ordered disclosed. Likewise, in Document 37, the first paragraph is simply a direction to xerox certain documents. Such

[1] Documents 8, 19, 29 and 35, although not within the group of documents submitted to the Court, can be included in the disposition since, as noted above, the descriptions in the Index accurately and adequately reflect the contents of the documents. The description of the unsubmitted documents, which show that the deleted portions contain exemption 5 material, can be accepted at face value. See *Ash Grove Cement Co.* v. *F.T.C.*, 511 F.2d 815 (D. C. Cir. 1975).

a statement is not within the protection of exemption 5 and will be ordered disclosed.

Two brief observations are in order. First, certain of the deletions are inconsistent with release of other material. This is particularly true in Item 18, where several recommendations of the staff were released while others—almost identical to the released portions—were deleted. The inconsistency is irrelevant to the validity of the deletions, however, and will not be taken into account, as plaintiff would have the Court do. Second, Documents 8, 19, 20, 28, 29, 30, 32 and 35 include directions from the staff to outside expert consultants regarding specific areas in which the staff requests expert advice. Although such questions are not opinions, recommendations, or advice, they are sufficiently close to the deliberative process of the staff author to mandate nondisclosure. The questions themselves disclose the areas of primary concern to the staff, and for this reason can legitmately be labeled a part of the deliberative process.[2]

Names and Addresses of Outside Expert Consultants

In Documents 7, 8, 10–14, 16, 19, 21, 23–33 and 36, defendants have deleted the identity of the outside expert consultant or consultants from whom the staff sought advice or comment upon the issues surrounding the new trade regulation. Plaintiff contends that these names are disclosable while defendants contend they are protected by exemption 5.

Beginning with *Soucie* v. *David*, 448 F. 2d 1067 (D. C. Cir. 1971), this Circuit has held that the opinions of outside expert consultants, when solicited by the agency to perform an agency function, are "intraagency memoranda" within the meaning of exemption 5. 448 F.2d at 1075–76. See also *Washington Research Project, Inc.* v. *Department of Health, Education and Welfare*, 504 F.2d 238, 249 (D. C. Cir. 1974); *Wu* v. *National Endowment for the Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972). As the Court of Appeals stated in *Soucie, supra:*

> The rationale of the exemption for internal communications indicates that the exemption should be available in connection with the Garwin Report even if it was prepared for an agency by outside experts. The Government may have a special need for the opinion and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity. A document like the Garwin Report should therefore be treated as an intra-agency memorandum of the agency which solicited it.

448 F.2d at 1078 n. 44.

[2] The policy of protecting communications between outside expert consultants and agency personnel should extend to communications from the agency to the consultant, particularly where the communication is a specific request for advice on a particular issue presently faced by the agency. See *Soucie* v. *David*, 448 F.2d 1067, 1075–76 (D. C. Cir. 1971).

None of these cases, however, treated a claim similar to that made by the government here, that the names and addresses of the experts, not their opinions, be exempt. The government has attempted to expand the policy of exemption 5—encouragement of a frank discussion of legal and policy matters in order to enhance the quality of agency decisions—beyond its necessary and proper limits. The FOIA "creates a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed." *Bristol Myers Co.* v. *FTC*, 424 F.2d 935, 938 (D. C. Cir. 1970). Outside expert consultants would not be chilled in their advice or recommendations to the agency if it were known that they had rendered advice. After all, as experts they are members of a profession which demands the rendition of advice to many groups. They should expect the fact of rendition to eventually become public. Protection of the content of the advice rendered would adequately serve the purpose of encouraging frank discussion, and therefore the names and addresses of the outside expert consultants will be ordered disclosed.[3]

Item 34—Mailing lists

Document 34 consists of five mailing or distribution lists of three different FTC Regional offices. The lists are of names and addresses of persons to whom materials concerning the proposed trade regulation themselves a bare name and address give no information about an individual which is embarrassing." 450 F.2d at 675. There is nothing in the instant case to which the names and addresses on the mailing lists could be linked other than the fact that they were sent materials by the FTC with regard to a proposed trade rule. That fact reveals nothing of an "intimate," "highly personal" or "embarrassing" nature about the individuals. Therefore, exemption 6 is inapplicable.

Assuming *arguendo* that exemption 6 is applicable and that the mailing lists can legitimately be characterized as "similar files," they are nonetheless disclosable because disclosure would not result in a "clearly unwarranted invasion of personal privacy." Defendants argue that plaintiff must state the purpose for which it desires the mailing lists in order for the Court to balance the competing interests, as was required by *Getman*, *supra* and *Rural Housing*, *supra*. It is true that *Getman* and *Rural Housing* required the Court to balance the extent of the invasion of personal privacy with "the public interest purpose of those seeking disclosure." *Rural Housing*, *supra* at 77, *Getman*, *supra* at 675. In light of *Ditlow*, *supra* and *Rose*, *supra*, however, such is no longer the appropriate procedure.

[3] This conclusion would also require disclosure of the name of the governmental consultant from another agency, which defendants attempt to protect in Document #20, as well as the deletion on page 2 of Document #32 of the residence of the consultant.

While not expressly rejecting the balancing test it had earlier embraced in *Getman* and *Rural Housing*, the *Ditlow* court seriously questioned its continuing vitality. Referring to the requirement that a specific purpose of plaintiff be considered rather than a general interest in disclosure, the *Ditlow* panel stated "that there is a substantial question whether Congress contemplated this limited balancing approach." 517 F.2d at 171. According to the panel "a balancing is envisioned," but "whether the balancing is to be performed in the context of unrestricted disclosure to the public or of a use specified release" is unclear:

> While the selectivity provided by the *Getman* approach might be desirable from a policy standpoint as allowing a more refined harmonizing of privacy and disclosure interests, it is questionable whether Congress intended to create such a broad exception to the "any person" provision by adopting the "clearly unwarranted" language of exemption 6. The interest in disclosure to the public may be characterized by showing the uses contemplated by some members of the public specifically, but not exclusively, the plaintiffs.

517 F.2d at 171–72 & n. 21.

On April 21, 1976, the Supreme Court decided *Rose*, *supra*, and in its discussion of the applicability of exemption 6, nowhere referred to a balancing test of the type contemplated by *Getman* or *Rural Housing*. According to the Court, the required balancing is "of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.' " Slip Op. at 18. It is the "public's right to Government information," rather than the specific purpose of the particular person seeking disclosure, which is the factor properly to be considered in determining whether disclosure would constitute a "clearly unwarranted invasion of personal privacy." See Slip Op. at 19. Of course, plaintiff, in seeking the documents from the FTC, presumably in order to analyze the agency's action concerning the proposed trade regulation, is fulfilling the core purpose of the Act, *i.e.*, opening up agency action to the light of public scrutiny. *Rose*, *supra* at 18. To require a more specific showing would run contrary to the teaching of *Rose*, as well as the strong dicta in *Ditlow*. If any balancing is required here, it should be between the "relatively minor" invasion resulting from disclosure of a bare list of names and addresses (*Getman*, *supra* at 675), and the public interest in opening up agency action to public scrutiny. In light of the "carefully considered congressional policy favoring disclosure," which "instructs the court to tilt the balance in favor of disclosure," the mailing lists involved here should be released. See *Ditlow*, *supra* at 169. Disclosure simply cannot

be termed a "clearly unwarranted invasion of personal privacy." See *Getman, supra.*

Proper Defendants

The FOIA contemplates that the agency, rather than the individual Commissioners or Secretaries heading those agencies, will be subject to suit under 5 U. S. C. § 552 (a)(4). Nowhere does the judicial review provision refer to agency personnel as proper defendants and it is unnecessary that a particular agency employee be a defendant in order to be subject to the sanctions of section 552(a)(4)(F). Accordingly, the complaint will be dismissed as to all individual defendants.

An appropriate Order is being entered simultaneously with this Memorandum.

UNITED STATES OF AMERICA v. A & R AGENCY, INC., et al.*

No. 74 C 1465. F.T.C. Docket No. 8716.

(United States District Court for the Northern District of Illinois, Eastern Division, July 20, 1976)

In civil penalties suit for alleged violations of F.T.C. order prohibiting billing for unauthorized advertisements, court held that deposition testimony of three witnesses regarding transactions occurring five to seven years previous, was inadequate to bear out the alleged violations.

Complaint dismissed with prejudice.

Edward B. Craig, Consumer Affairs Div., Dept. of Justice, Washington, D.C., for plaintiff.

John T. Cusack and *John W. Conniff*, of *Gardner, Carton & Douglas*, Chicago, Ill., for defendents.

Before DECKER, *District Judge*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was tried before this court without a jury on July 7, 1976. The following constitutes the findings of fact and conclusions of law as required by F. R. Civ. P. 52(a).

Findings of Fact

1. On May 29, 1974, plaintiff instituted this civil action under Section 5(l) of the Federal Trade Commission Act (15 U.S.C. § 45(l)) seeking certain relief against defendants A & R Agency, Inc., Louis S. Bourjaily, Jr., and Paul Bourjaily, for alleged violations of a cease and desist order ("Order") entered by the Federal Trade Commission in 1968. The alleged violations occurred principally during the years 1969 through 1972.

2. A copy of the Order is attached as Appendix A. Generally, it prohibits defendants from: (a) representing that the circulation of any publication represented is in any stated amount (unless that representation is true)(Para. 1); (b) misrepresenting the extent or character of circulation or readership of any publication for which an advertisement is being solicited (Para. 2); (c) placing any advertisement on behalf of any person in any publication without a prior authorization (Para. 3); (d) printing any advertisement for a number of insertions in excess of the number authorized (Para. 4); (e) sending bills for any advertisement without a prior authorization to purchase (Para. 5).

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶61,048 at 69,727 (1976-2 Trade Cases). For case before the Commission, see 73 F.T.C. 5.

3. A & R Agency, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business at 223 W. Washington Street, Chicago, Illinois.

4. A & R Agency, Inc. has been engaged for over 30 years in the business of representing various publications for the purpose of soliciting advertisements. A & R Agency, Inc. represents numerous established publications, including *The New World* (official newspaper of the Roman Catholic Archdiocese of Chicago), *Stars and Stripes*, *The Masonic Chronicler*, as well as a number of the foreign language newspapers in the Chicago area. In order to solicit an advertisement, a representative of A & R Agency, Inc. usually contacts a potential advertiser by telephone. In the case of advertisers located outside the Chicago area, once the representative obtains authorization for the advertisement over the telephone, during the same phone call, the authorization is orally confirmed by a supervisor of A & R Agency, Inc. Subsequently, in every case, a written confirmation of the advertisement is mailed to the advertiser on the same day or on the next succeeding business day. On the day following authorization of an advertisement, an invoice is prepared which is retained until it is due to be mailed. During the time period encompassed by the violations, in the case of a newspaper, the invoice was mailed at termination of the advertisement; in the case of a magazine, the invoice was mailed with a copy of the advertisement. In any case where an advertiser disclaims authorization to A & R Agency, Inc. for an advertisement upon receipt of a confirmation letter, the advertisement is cancelled, if prior to publication; if subsequent to publication, an attempt is made to collect the amount of the advertisement. Most accounts in the latter category are ultimately charged off as uncollectable.

Defendants engage in a high-volume, high-risk business. The business is high-volume in that approximately 15–25,000 accounts are serviced each year, involving 50–100 ad solicitations each day. The business is high-risk because it is necessarily a telephone solicitation business where defendants are frequently at the mercy of disgruntled advertisers who may refuse to pay their bills.

5. Louis S. Bourjaily, Jr. is President of A & R Agency, Inc. During the period June, 1969 through June, 1973, he served as an officer and director of A & R Agency, Inc.

6. Paul Bourjaily is Director of Sales, A & R Agency, Inc. During the period June, 1969 through June, 1973, he served as an officer and director of A & R Agency, Inc.

7. Frank Sacks, although named as a defendant in the complaint, was not served with summons and complaint pursuant to Rule 4, *Fed. R. Civ. P.*

8. When the complaint was filed on May 29, 1974, plaintiff sought relief for 38 purported violations of the Order. These 38 violations actually represented 19 separate advertising accounts of A & R Agency, Inc. Prior to and during trial, plaintiff indicated that it would not introduce evidence on 32 of the 38 purported violations, or on 16 of the 19 separate advertising accounts. These alleged violations were contained in Count I, paragraphs 15(a), (b), (c), (d) and (f); Count II, paragraphs 16(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (s), (u), (v), (w), (x) and (y); Count III, paragraphs 17(a), (c), (d) and (e); and Count IV, paragraph 18.

9. At trial, plaintiff introduced evidence on the remaining six alleged violations of the Order. Plaintiff's evidence principally consisted of deposition testimony of three witnesses, introduced pursuant to Rule 32 (a)(3), *Fed. R. Civ. P.* The three witnesses were Sutter Kunkel, Long Beach, California; Dorothy Rathbun, Reno, Nevada; and David Littlefield, Houston, Texas. Defendants' evidence was principally presented in the testimony of Louis S. Bourjaily, Jr., Anthony Duffy, advertising manager of *The New World*, and James Sirois, publisher of the *Real Estate News*. The latter two witnesses testified to defendants' undisputed character for truthfulness and honesty in business dealings.

10. Based upon the foregoing testimony and various items of documentary evidence admitted upon stipulation of the parties, and introduced at trial, this court is not persuaded:

(A) That A & R Agency, Inc. printed and billed for an advertisement appearing in the March, 1970 issue of *Marian National Catholic Magazine ("Marian Magazine")* without the prior authorization of Sutter Kunkel, as plaintiff contends in Count I, paragraph 15(e), and Count II, paragraph 16(t). Nor is the court persuaded that the circulation of *Marian Magazine* was misrepresented to Kunkel in a telephone conversation preceding placement of the advertisement, as plaintiff contends in Count III, paragraph 17(b). The evidence showed that:

The transaction in issue is over six years old. Kunkel claims that the advertisement in question was not authorized. Defendants contend that the advertisement was authorized. Kunkel was sent and received written confirmation of the advertisement. He failed to communicate with A & R Agency, Inc., to disclaim authorization of the advertisement, which did appear in the magazine. Kunkel never paid for the advertisement (he admits that his mail order business was "very unsuccessful"); however, A & R Agency, Inc. was required to and did pay its publisher for the advertisement, and the salesperson apparently lost whatever commission might have been earned by the sale. Kunkel apparently gave a bank reference to the salesperson soliciting the

advertisement, as well as a correct billing address. Moreover, certain changes were made to the advertising copy which had previously appeared in the *Los Angeles Times Magazine*. Kunkel could not testify with any certainty as to figures which were allegedly quoted to him during the telephone conversation preceding placement of the advertisement, and could not testify that those figures related to circulation of the publication represented.

(B) That A & R Agency, Inc. printed or billed for an advertisement in the May, 1971 issue of *Civil Service Reporter* without the prior authorization of Dorothy Rathbun, as plaintiff contends in Count I, paragraph 15(g), and Count II, paragraph 16(r). The evidence showed that:

The transaction in question is over five years old. Ms. Rathbun claims that she did not authorize this advertisement. Defendants contend that she did authorize the advertisement. She also, however, was sent written confirmation of the advertisement. She failed to communicate with A & R Agency, Inc. to disclaim authorization for the advertisement, which appeared in the magazine. Ms. Rathbun never paid for the advertisement (she admits that her mail order business lasted about six months). The advertisement did appear in the May, 1971 *Civil Service Reporter*. She claims that the only advertisement she ever authorized was for the *Sunset Magazine*. However, the allegedly authorized advertisement at least appeared in the June, 1971 issue of *Sunset Magazine*—or one month following the appearance of the allegedly unauthorized advertisement which appeared in the May, 1971 issue of *Civil Service Reporter*. It is not clear whether the advertisement appeared in the *Sunset Magazine* prior to June, 1971, and it is unclear when the advertisement for *Sunset Magazine* was authorized.

(C) That A & R Agency, Inc. billed for an advertisement in the *Svenska Amerikanaren Tribunen* without the prior authorization of Hermann Hospital, Houston, Texas, as plaintiff contends in Count II, paragraph 16(q). The evidence showed that:

The transaction in question is nearly seven years old. David Littlefield, then employed by Hermann Hospital, disclaims authorization for the advertisement on behalf of the hospital. Defendants contend that the advertisement was authorized. It is undisputed that a written confirmation letter was sent. The hospital failed to communicate with A & R Agency, Inc. to disclaim authorization for the advertisement. The hospital never paid for the advertisement, yet A & R Agency, Inc. was required to pay its publisher, and the salesperson apparently lost her commission.

Conclusions of Law

1. This court has subject matter jurisdiction based upon 28 U. S. C. §§ 1331(a), 1337, 1345 and 1355.

2. Venue is proper in this district under 28 U. S. C. §§ 1391(b), 1391(c) and 1395(a).

3. This court lacks personal jurisdiction over Frank Sacks who was not served with summons and complaint as required by Rule 4, *Fed. R. Civ. P.* Accordingly, the complaint as to Frank Sacks is dismissed with prejudice pursuant to Rule 41(b), *Fed. R. Civ. P.*

4. Plaintiff failed to introduce any evidence on the following alleged violations in the complaint: Count I, paragraphs 15(a), (b), (c), (d) and (f); Count II, paragraphs 16(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (s), (u), (v), (w), (x) and (y); Count III, paragraphs 17(a), (c), (d) and (e); and Count IV, paragraph 18. Accordingly, the complaint as to such alleged violations, as well as to any other transactions which could have been alleged as violations in the complaint, is dismissed with prejudice pursuant to Rule 41(b), *Fed. R. Civ. P.*

5. Plaintiff failed to bear its burden of proving Count I, paragraphs 15(e) and (g), Count II, paragraphs 16(q), (r) and (t); and Count III, paragraph 17(b), by a preponderance of the evidence. Accordingly, all relief sought by plaintiff as to such alleged violations is denied; the clerk shall enter judgment in favor of defendants as to each such alleged violation pursuant to Rule 58, *Fed. R. Civ. P.*

6. Defendants may recover costs pursuant to 28 U.S.C. §§ 1920, 1923, and 2412, and Rule 54(d), *Fed. R. Civ. P.* Defendants are directed to file, within ten days of the entry of judgment, a bill of costs with the Clerk, pursuant to Local General Rule 45.

SPIEGEL, INC. v. FEDERAL TRADE COMMISSION.*

No. 75–1919. F.T.C. Docket No. 8990.

(United States Court of Appeals, Seventh Circuit, August 9, 1976)

1. ADMISSION OF RELEVANT FACTS CONTAINED IN F.T.C. COMPLAINT IS NOT TO BE EQUATED WITH AN ADMISSION OF F.T.C. FINAL FACTUAL AND LEGAL CONCLUSIONS.

[288] Retailer's admitting all material facts contained in Federal Trade Commission's unfair practices complaint did not constitute an admission of the ultimate factual or legal conclusions reached by the Commission.

2. TO ENFORCE A JUDGMENT OBTAINED IN ANOTHER JURISDICTION, A DEFENDANT MAY RAISE THE ISSUE OF LACK OF PERSONAL JURISDICTION IN HIS HOME STATE.

A defendant may raise the issue of lack of personal jurisdiction in his home state to enforce a judgment obtained in another jurisdiction.

3. EVEN WHEN PRACTICE WAS PROPER UNDER STATE LAW, F.T.C. WAS NOT BARRED FROM FINDING USE OF ILLINOIS LONG-ARM STATUTE IN SUING NONRESIDENT DELINQUENT CUSTOMERS AN UNFAIR TRADE PRACTICE.

Fact that Illinois based retailer's use of state long-arm statute to sue nonresident customers to recover on delinquent credit accounts may have been proper under Illinois law did not bar Federal Trade Commission from finding that such practice constituted an unfair business practice.

4. ALTHOUGH LEGALLY PROPER, CONDUCT UNFAIR TO THE PUBLIC MAY BE PROHIBITED BY F.T.C.

Federal Trade Commission has authority to prohibit conduct that, although legally proper, is unfair to the public.

5. WHEN A PRACTICE OFFENDS PUBLIC POLICY, IS IMMORAL, UNETHICAL, OPPRESSIVE, UNSCRUPULOUS AND SIGNIFICANTLY HARMFUL TO CONSUMERS, IT IS "UNFAIR" WITHIN THE MEANING OF THE F.T.C. ACT.

A practice is "unfair" within meaning of Federal Trade Commission Act when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

6. REASONABLE ASSUMPTIONS MAY BE DRAWN FROM THE RECORD BY THE F.T.C.

Federal Trade Commission may draw reasonable inferences from the record.

7. CUSTOMERS WERE PROPERLY CHARACTERIZED AS "CONSUMERS" BY THE F.T.C.; AND THE RECORD SUPPORTED ITS CONCLUSION THAT USE OF LONG-ARM STATUTE TO SUE DISTANT CUSTOMERS WAS AN UNFAIR TRADE PRACTICE.

Federal Trade Commission's conclusion that Illinois based retailer's use of the state long-arm statute to sue distant mail order customers on delinquent credit accounts violated public policy and was injurious to consumers and, hence, constituted an unfair trade practice, was supported by the record; it was

* Reported in 540 F.2d 287 (1976). For case before the Commission, see 86 F.T.C. 425; *modified* 88 F.T.C. 1000.

reasonable to conclude that since the suits involved relatively small amounts the choice of retaining local counsel or traveling to the forum was virtually foreclosed by economic considerations; furthermore, Commission correctly characterized the customers as "consumers."

8. PASSING ON THE CONSTITUTIONALITY OF ADMINISTRATIVE OR LEGISLATIVE ACTION IS GENERALLY BEYOND THE POWER OR EXPERTISE OF FEDERAL ADMINISTRATIVE AGENCIES.

Generally, federal administrative agencies are without power or expertise to pass on the constitutionality of administrative or legislative action.

9. WHERE QUESTION AS TO DEPRIVATION OF DUE PROCESS COULD ONLY BE DECIDED ON A CASE-BY-CASE BASIS, F.T.C. EXCEEDED ITS AUTHORITY IN DETERMINING THAT FIRM'S USE OF LONG-ARM STATUTE CONSTITUTED A PER SE VIOLATION OF CONSUMER'S RIGHT TO DUE PROCESS.

Federal Trade Commission exceeded its authority in finding that Illinois based retailer's use of state long-arm statute to sue nonresident customers on delinquent credit accounts constituted a per se violation of consumer's right to due process; question of whether use of the statute amounted to a deprivation of due process could only be made on a case-by-case basis.

10. ALTHOUGH RETAILER'S CONDUCT DID NOT CONSTITUTE A DEPRIVATION OF DUE PROCESS, IT DID VIOLATE F.T.C. ACT, AND BOARD'S ORDER WOULD BE ENFORCED.

Although Federal Trade Commission erred in finding that Illinois based retailer's use of state long-arm statute to sue nonres[289]ident customers on delinquent credit accounts per se amounted to a violation of due process, Board's order would be enforced since retailer's conduct amounted to a violation of the Federal Trade Commission Act, even though it might not amount to a deprivation of due process.

11. A PRACTICE THAT REPEATEDLY WITHSTOOD ATTACK IN COURTS MAY STILL BE FOUND UNFAIR BY F.T.C.

Federal Trade Commission may find a practice to be unfair even though the same practice has repeatedly withstood attack in the courts.

12. ALTHOUGH LEGALLY ACCEPTABLE, A BUSINESS PRACTICE CONTRARY TO PUBLIC POLICY MAY BE PROHIBITED UNDER THE F.T.C. ACT.

A business practice which is not in violation of the common law or the criminal statutes may still be prohibited under Federal Trade Commission Act if it is contrary to public policy.

13. THE FORM OF F.T.C. ORDERS IS SUBJECT TO JUDICIAL REVIEW EVEN THOUGH F.T.C. HAS BEEN GRANTED THE DISCRETION AND RESPONSIBILITY FOR FASHIONING THE TYPE OF ORDER NECESSARY TO COPE WITH UNFAIR PRACTICES.

While courts have granted Federal Trade Commission discretion in formulating the type of order that is necessary to cope with the unfair practices found and while Congress has entrusted the Commission with primary responsibility for fashioning orders, the form of the order is nevertheless subject to judicial review.

14. PROHIBITIONS IN AN ORDER MUST BE CLEAR AND PRECISE TO ENSURE UNDERSTANDING BY THOSE AGAINST WHOM THE ORDER IS DIRECTED, AND REMEDIES MUST REASONABLY RELATE TO UNLAWFUL PRACTICES FOUND TO EXIST.

Remedies selected by Federal Trade Commission must bear a reasonable relationship to the unlawful practices found to exist; prohibitions of an order must be clear and precise so that they may be understood by those against whom they are directed.

15. ORDER WOULD NOT BE ENFORCED INSOFAR AS RELATED TO ILLINOIS CUSTOMERS WHO WERE SUED IN A COUNTY COURTHOUSE WHICH WAS A REASONABLE DISTANCE FROM THEIR RESIDENCE.

Order entered by Federal Trade Commission on finding that Illinois based retailer was engaging in an unfair practice by suing delinquent credit account customers in courts distant from their residence was too broad where it included suits filed in Illinois against Illinois mail order customers and rationale underlying finding of unfair practice dealt exclusively with use of state long-arm jurisdiction and neither complaint nor Commission's opinion mentioned or discussed any allegedly unfair abuse of venue against Illinois customers; order would not be enforced insofar as related to Illinois customers who were sued in a county courthouse which was a reasonable distance from their residence.

16. APPELLATE COURT IS NOT ALWAYS PROHIBITED FROM CONSIDERING ISSUES PREVIOUSLY UNRAISED; AND WHERE, UNTIL FINAL ORDER WAS ISSUED, THERE WAS NO INDICATION THAT IT WOULD CONTAIN MATTERS NOT PREVIOUSLY RAISED IN COMPLAINT OR OPINION, OVERBREADTH OF ORDER COULD BE RAISED OF THE FIRST TIME ON JUDICIAL REVIEW.

Overbreadth of Federal Trade Commission order in unfair practices case could be raised for first time on judicial review where it was not until final order issued that there was an indication that order would include matters raised neither in the complaint nor in Commission's opinion; furthermore, considerations by an appellate court of an issue not previously raised before the Commission is not always prohibited by the rules.

17. ONLY IF THE ORDER BEARS A REASONABLE RELATION TO THE VIOLATION DOES JUSTICE REQUIRE THAT ENFORCEMENT BE GRANTED.

Justice requires enforcement of a Federal Trade Commission order be granted only to the extent that it bears a reasonable relation to the violation charged.

18. SINCE USE OF STATE LONG-ARM STATUTE TO SUE NONRESIDENT CUSTOMERS WAS BASIS FOR F.T.C. FINDING OF UNFAIR TRADE PRACTICE, ENFORCEMENT OF ORDER'S REPORTING REQUIREMENTS WOULD BE LIMITED TO SUITS FILED BY RETAILER OR ITS AGENTS IN COUNTIES OTHER THAN WHERE DEFENDANT RESIDED OR SIGNED RELEVANT CONTRACT.

Since Federal Trade Commission's finding that Illinois based retailer had engaged in unfair trade practice was based on its use of state long-arm statute to sue nonresident customers on delinquent credit accounts, enforcement of that portion of order requiring retailer to prepare and maintain summaries of suits instituted in a two-year period would be enforced only insofar as it required reporting of suits instituted in a county other than where defendant resided or signed the contract sued on; also, reasons for such choice of forum was to be explained in the report, which was to include any suit brought outside the aforementioned counties by collection agencies or other agents of the retailer.

(Syllabus, with substituted captions, taken from 540 F.2d 287)

On appeal from judicial review of F.T.C. order, court held that where

the Commission found practice, though legally proper under state law, to be unfair, it was authorized to prohibit such practice; that record supported allegation that retailer's use of Illinois long-arm statute to sue distant customers violated public policy; that in finding firm's conduct per se violated due process, Commission exceeded its power; that where firm had not been charged with abusing Illinois venue provisions, order prescribing use of such provisions was too broad, and would not be enforced where it related to Illinois residents sued in courts within reasonable distance from their residences; and record requirements would be modified so that retailer need report only those suits initiated in counties other than where customers resided or signed relevant contracts.

The order of the Commission is enforced as modified.

Patrick W. O'Brien, Chicago, Ill., *Basil J. Mezines,* Washington, D.C., for petitioner.

Gerald Harwood, Asst. Gen. Counsel, *Mark W. Haase,* Atty., F.T.C., Washington, D.C., for respondent.

Before FAIRCHILD, *Chief Circuit Judge,* BAUER, *Circuit Judge,* CAMPBELL, *Senior District Judge.**

BAUER, *Circuit Judge.*

[290] Essentially the question before us is whether the Federal Trade Commission ("FTC") has the power to prevent large retail businesses from suing customers for delinquent credit accounts in a court distant from the consumer's residence. The FTC ordered that petitioner Spiegel "cease and desist from instituting suits except in the county where the defendant resides at the commencement of the action, or in the county where the defendant signed the contract sued upon." Spiegel brings this appeal of the Commission's order.

[1] There is no dispute as to the facts of the case. Spiegel admitted all of the material facts contained in the FTC complaint.[1] The complaint charges that Spiegel violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45,[2] which prohibits unfair business practices, by instituting collection suits in the Circuit Court of Cook County, Illinois, against retail credit mail order purchasers who reside in states other than Illinois.

Spiegel is a Delaware corporation with its office and principal place of business in Chicago, Illinois. It is a catalog retailer engaged in the advertising, offering for sale, and distribution of clothes, household

* The Honorable William J. Campbell, United States District Court for the Northern District of Illinois, is sitting by designation.

[1] Spiegel's action in admitting the factual allegations was not intended to constitute an admission of the ultimate factual or legal conclusions reached by the Commission. We appreciate this conduct by Spiegel's attorneys in attempting to facilitate the litigation and, on appeal, have treated their answer according to their limited intent.

[2] Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(6) states *inter alia:*

"The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

goods, appliances, tools, tires, and various other articles of merchandise. In the course of its mail order business, it receives orders in Illinois from purchasers in various states and ships products to them in their home states. It regularly extends credit to consumers in order to facilitate purchase of the products.

[2] Previously, in the course of its collection of retail credit accounts, Spiegel regularly used Illinois courts to sue allegedly defaulting retail mail order purchasers who resided outside of Illinois. The practice of filing suits in Illinois was terminated in February 1973 because this collection method proved unsatisfactory to Spiegel.[3] In filing these collection suits Spiegel used the Illinois long-arm statute[4] to establish jurisdiction. Spiegel voluntarily dismissed those actions where the defendant raised an objection to the inconvenience of the forum. **[291]** Of course, in order to object the consumer had to travel to the Illinois court or obtain local counsel, an act which was often impractical considering the amount in dispute in most cases.

Many of the customers sued by Spiegel live outside the State of Illinois. They received Spiegel's catalogs and advertising material in their homes and executed the contract to purchase in their home states. Almost all of them have no pertinent contact within the State of Illinois other than their dealings with Spiegel.

The administrative law judge determined that the distance, cost and inconvenience of defending such suits in Illinois placed a virtually insurmountable burden on the out-of-state defendants to appear, answer and defend. Subsequently the Commission concluded that Spiegel's collection practices through the use of the Illinois courts was offensive to clearly articulated public policy and oppressive and injurious to consumers.

On appeal Spiegel principally argues: that its conduct was legal and appropriate under Illinois law; that its conduct does not amount to a violation of Section 5 of the Act; that the Commission exceeded its authority in deciding the case on the basis of consumer's due process rights; that the Commission's order is burdensome and unwarranted since Spiegel has represented that it has stopped suing its customers in distant courts.

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[3] According to Spiegel's brief this was due to the fact that judgments in Illinois, as in many other states, are not self-executing and require supplementary proceedings in other jurisdictions in order to collect the judgment. See, *e. g., Riley v. New York Trust Co.*, 315 U.S. 343, 349, 62 S.Ct. 608, 86 L.Ed. 885 (1942). A defendant may raise the issue of lack of personal jurisdiction in his home state to enforce a judgment obtained in another jurisdiction. *See also Hanson v. Denckla*, 357 U.S. 235, 255, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

[4] Ill.Rev.Stat. Ch. 110, § 17 provides *inter alia*:

> "(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:
>
> (a) The transaction of any business within this State * * *."

Not only has the Illinois statute been used as a model by a number of other states, but more than one half of the states have enacted a long-arm statute in one form or another.

I. ASSUMING ARGUENDO THAT SPIEGEL'S CONDUCT WAS PROPER UNDER ILLINOIS LAW, THE FTC MAY STILL FIND A VIOLATION OF SECTION 5.

Under Illinois law Spiegel's conduct may have been perfectly proper. Whether it is unfair to hold a consumer answerable in a foreign forum for a mailorder credit account in arrears is a difficult jurisdictional question. It is clear, however, that in some cases jurisdiction would be proper.

Modern day long-arm jurisdiction stems from a landmark decision by the Supreme Court in *International Shoe Co.* v. *Washington*, 362 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Therein, Chief Justice Stone summarized the development of the concept of *in personam* jurisdiction in the following oft-quoted passage:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain [minimal] contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

The "minimal contacts" standards of *International Shoe*, however, did not provide for a simple, mechanical test. Instead the courts have adopted a case-by-case approach in evaluating the contact of the defendants with the forum. The Sixth Circuit recently attempted a review of the major decisions since *International Shoe* in *In-Flight Devices Corp.* v. *Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972). The Court set out a three-part test to determine whether jurisdiction was proper:

1. the defendant must purposely avail himself of the privilege of acting in the forum state or causing a consequence in the forum state;
2. the cause of action must arise from the defendant's activities in the forum state; and
3. the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable.

In applying this triple test, however, the Court warned at p. 226:

> It is imperative that it be understood that the flexibility, and therein the virtue, of the *International Shoe* test is retained in the third condition and no mechanical consideration of the first two elements of the test can eliminate the need for an appraisal of the overall circumstances of each case if jurisdiction is to be found.

This Court has also adopted a similar position in *Hutter Northern Trust* v. *Door* [292] *County Chamber of Commerce*, 403 F.2d 481 (7th Cir. 1968). Therein, Judge Swygert wrote:

A basic consideration which underlies the law relating to jurisdiction over nonresidents is that the evidence of sufficient contacts within a state to avoid violation of due process by substituted service depends upon the particular facts of each case. *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 671 (1961).

* * * * * * *

Whether sufficient minimum contacts exist cannot be answered by applying a formula or rule of thumb, but by ascertaining what is fair and reasonable in the circumstances of the particular situation.

As a consequence of these decisions it is impossible to make an abstract determination that an Illinois court would have proper jurisdiction over a suit against a defaulting mail order purchaser. In some decisions, where the case-by-case method has been employed, there are rulings which might favor jurisdiction in situations similar to the instant problem.[5] On the other hand, there is some language in *In-Flight Services* v. *Van Dusen Air, Inc., supra*,[6] and other cases[7] which state that it would be unfair to find jurisdiction in a foreign forum over a suit based simply on a mail order contract.

[3,4] Assuming *arguendo* that jurisdiction under Illinois law is proper, we still believe that the FTC has the power to enjoin Spiegel from bringing the suits. In *Federal Trade Commission* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972), the Supreme Court left no doubt that the FTC had the authority to prohibit conduct that, although legally proper, was unfair to the public. In *Federal Trade Commission* v. *Sperry & Hutchinson Co., supra*, the defendant argued that it was beyond the power of the Commission to declare unfair its practice of successfully prosecuting trading stamp exchanges in state and federal courts. Its argument was also based on the theory that since the corporate conduct was within the technical bounds of the law it could not be prohibited by the FTC. The Supreme Court, after reviewing the legislative history and leading cases dealing with Section 5 of the Act, concluded:

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[5] See *O'Hare International Bank* v. *Hampton*, 437 F.2d 1173 (7th Cir. 1971) (a single telephone call based on a contract to be performed in Illinois); *Ziegler* v. *Hodges*, 80 Ill.App.2d 210, 224 N.E.2d 12 (2d Dist. 1967) (a single mailing and telephone communication); *Travelers Health Ass'n* v. *Virginia*, 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154 (1950) (defendant's primary contacts with the forum state were by mail); *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957) (solicitation of a single life insurance contract by mail). In each of these cases jurisdiction was upheld based upon a finding of sufficient contact with the forum state.

[6] The Court stated at p. 227, footnote 13:

"[I]t would certainly be unfair to hold consumers answerable in a foreign forum for unpaid bills simply on the basis of a 'mail order contract.' "

[7] In *Geneva Industries, Inc.* v. *Copeland Construction Co.*, 312 F.Supp. 186, 188 (N.D.Ill. 1970), Judge Will stated in *dicta:*

"The notion that any customer of an Illinois based mail order house such as Sears Roebuck or Montgomery Ward would be subject to the jurisdiction of Illinois courts is obviously violative of the most minimal standard of minimum contacts and the fundamental structure of the federal system." *See also, Nordberg Div. of Rex Chainbelt, Inc.* v. *Hudson Engineer Corp.*, 361 F.Supp. 903 (E.D.Wisc.1973); *Conn* v. *Whitmore*, 9 Utah 2d 250, 342 P.2d 871 (1959); *United States Railway Equipment Co.* v. *Port Huron and Detroit Railroad Co.*, 58 F.R.D. 588 (N.D.Ill. 1973); *Gelderman* v. *Dussault*, 384 F.Supp. 566 (N.D. Ill.1974); *Whittaker Corp.* v. *United Aircraft Corp.*, 482 F.2d 1079, 1084 (1st Cir. 1973).

[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws. 405 U.S. at 244, 92 S.Ct. at 905.

[293] Previously, this Court, in *Peerless Products* v. *Federal Trade Commission*, 284 F.2d 825 (7th Cir. 1960), *cert. denied* 365 U.S. 844, 81 S.Ct. 804, 5 L.Ed.2d 809 (1960), rejected the argument that a practice, legal under local law, could not be banned under Section 5. In *Peerless* local ordinances sanctioned the use of merchandise punchboards. The Court upheld the FTC's power to hold their use unlawful, stating:

Unless Congress specifically withdraws authority in particular areas, the Commission, upon its general grant of authority under 15 U.S.C.A. § 45(a)(6), can restrain unfair business practices in interstate commerce even if the activities or industries have been the subject of legislation by a state or even if the intrastate conduct is authorized by state law [citations omitted].

[5] In determining whether Spiegel's challenged practices are unfair under Section 5 of the Act, the Commission remained faithful to its previously announced criteria. A practice is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.[8]

In this case, since the facts are not in dispute, the Commission only had to determine whether Spiegel's policy of using state long-arm statutes against distant mail order customers violated public policy and was injurious to consumers. In making that determination the Commission concluded:

[S]piegel's practice of suing its out-of-state mail order customers in Illinois courts is patently offensive to clearly articulated public policy, intended to guarantee all citizens a meaningful opportunity to defend themselves in court.

* * * * * * *

[R]espondent's use of the Cook County forum, . . . forces the consumer who wishes to defend to appear in a courtroom hundreds or thousands of miles from home, at a cost in travel alone which may exceed the amount in controversy. The option of hiring a lawyer who would be able to file a motion contesting jurisdiction is likely to be equally unviable. Nor do we think it lessens the damage done to argue that judgments unfairly obtained by Spiegel would be rejected if it attempted to collect on them. Affirmative efforts to defend a collection suit can also impose costly and unaccustomed burdens on the

[8] See footnote 5 of the Supreme Court's decision in *FTC* v. *Sperry & Hutchinson*, *supra*, which approved the criteria employed in this case. It states at 405 U.S. at 243, 92 S.Ct. at 905:

"The Commission has described the factors it considers in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair:

'(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory or other established concept of unfairness;

(2) whether it is immoral, unethical, oppressive, or unscrupulous;

(3) whether it causes substantial injury to consumers (or competitors or other businessmen).' "

consumer, and in any event there are many injurious uses which can be made of improper judgments, short of execution, such as sullying credit records . . .

[6] Spiegel challenges the Commission's conclusion by arguing that it has no factual basis in the record. Admittedly the factual record in this case is sparse. Nevertheless, the Supreme Court has previously stated that the Commission may draw reasonable inferences from the record. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966); *Federal Trade Commission* v. *Pacific States Paper Ass'n*, 273 U.S. 52, 63, 47 S.Ct. 255, 71 L.Ed. 534 (1927); *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 739, 65 S.Ct. 961, 89 L.Ed. 1320 (1945); *Spiegel, Inc.* v. *Federal Trade Commission*, 411 F.2d 481 (7th Cir. 1969).

[294] [7] We believe that the inferences upon which the Commission's conclusion is built are reasonably supported by the record.

The Commission correctly characterized Spiegel's customers as "consumers" since retail purchasers of clothing, household goods, and other types of merchandise described in the complaint are, by definition, consumers. Moreover, paragraph 4 of the complaint specifically identifies the persons to whom Spiegel extends credit as "consumers." It was also fair for the Commission to conclude that Spiegel's customers are "the quintessential passive buyers who . . . sit by until the goods are delivered." The record clearly shows that Spiegel's customers are out-of-state mail order purchasers, almost all of whom received Spiegel's catalogs or other advertising matter and executed purchase orders or contracts in their home states, and had no pertinent contacts with the State of Illinois other than their dealings with Spiegel.

Similarly, it was reasonable for the Commission to conclude that Spiegel's suits involve relatively small amounts, since it is unlikely that many, if any, mail orders of the types of merchandise described in the complaint involve transactions valued in "thousands of dollars," as Spiegel now argues on appeal. It is equally unlikely that the suits involve cumulations of numerous small debts, since neither Spiegel nor any other rational mail order retailer would long continue to extend credit to distant consumer accounts already believed to be in default.

The Commission's observations concerning the difficulties and costs which stand in the way of consumers who wish to defend against suits in a distant forum are matters of common knowledge. Where suits involve relatively small debts, the choice of retaining counsel is not a practical alternative, even in one's home town, and, since travel costs alone may exceed the amount in controversy, a *pro se* appearance in an out-of-state forum is virtually foreclosed by economic considerations.

II. THE COMMISSION EXCEEDED ITS AUTHORITY IN MAKING A CONSTITUTIONAL DETERMINATION.

[8] A reading of the Commission's opinion indicates that it based its decision in part upon the finding that Spiegel's practice of filing lawsuits against mail order credit customers in Cook County under the long-arm statute violated those customers' rights to due process. Generally, federal administrative agencies are without power or expertise to pass upon the constitutionality of administrative or legislative action. *See, e.g., Oesterich* v. *Selective Service Board*, 393 U.S. 233, 242, 89 S.Ct. 414, 21 L.Ed.2d 402 (1968); *Public Utilities Comm'n of State of California* v. *United States*, 355 U.S. 534, 539, 78 S.Ct. 446, 2 L.Ed.2d 470 (1958); *Engineers Public Service Co.* v. *Securities and Exchange Commission*, 138 F.2d 936, 952–53 (D.C.Cir. 1943), *vacated as moot*, 332 U.S. 788, 68 S.Ct. 96, 92 L.Ed. 370 (1947); *Finnerty* v. *Cowen*, 508 F.2d 979, 982 (2d Cir. 1974).

[9–12] As we stated previously, the question of whether Spiegel's use of the long-arm statute amounts to a deprivation of the due process clause can only be made on a case-by-case basis. Thus the Commission[9] erred in finding that Spiegel's conduct *per se* amounted to a violation of the consumer's right of due process.

Nevertheless, we have decided to enforce the Board's order because we believe that Spiegel's conduct amounted to a violation of Section 5 even though it may not amount to a deprivation of due process. Moreover, as the *FTC* v. *Sperry & Hutchinson*, *supra*, case teaches, the Commission may find a [295] practice to be unfair within the meaning of Section 5 even though the same practice has repeatedly withstood attack in the courts.[10]

III. THE COMMISSION'S ORDER IS INAPPROPRIATE IN RELATION TO THE VIOLATIONS FOUND.

The final order entered by the Commission provides in part:

It is ordered that respondent, in connection with the collection of retail credit accounts in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act,

[9] One member of the Commission (Stephen Nye) filed a separate concurring opinion suggesting that the Commission should have avoided the constitutional issue. He correctly stated:

"It is an important principle of our jurisprudence that constitutional questions should be avoided in a case which can be resolved on statutory or common law grounds [citing Frankfurter, Law & Politics, 24 (1939)]. That principle should apply with special force to an administrative agency, which has no particular competence to address issues of constitutional dimension."

[10] A business practice which is not in violation of the common law or the criminal statutes may still be prohibited if it is contrary to public policy. *See National Candy Co.* v. *Federal Trade Commission*, 104 F.2d 999 (7th Cir. 1939), where this Court affirmed an order of the Commission against the use of a candy lottery, stating:

"[A] method of competition which is contrary to the established public policy of the United States is an unfair method of competition within the intent and meaning of section 5 of the statute. A violation of public policy is an injury to the public, and it is in the public interest to prevent the use of a method of competition which is contrary to an established public policy of the Federal Government, even if injury to competitors be not alleged or proved." 104 F.2d at 1006.

do forthwith cease and desist from instituting suits except in the county where the defendant resides at the commencement of the action, or in the county where the defendant signed the contract sued upon. This provision shall not preempt any rule of law which further limits choice of forum which requires, in actions involving real property or fixtures attached to real property, that suit be instituted in a particular county.

The Commission issued this broad order despite the fact that the allegations of the complaint only charged Spiegel with bringing suit against out-of-state residents in the Circuit Court of Cook County, Illinois. The complaint contains no allegations as to Spiegel's practice with respect to Illinois credit customers. In effect, the order proscribes Spiegel's use of Illinois' venue provisions although the FTC made no charge that Spiegel had abused such provisions.

[13,14] While the courts have granted the FTC discretion in formulating the type of order that is necessary to cope with the unfair practices found, *Jacob Spiegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 66 S.Ct. 758, 90 L.Ed. 888 (1946), and Congress has entrusted the Commission with primary responsibility for fashioning orders, *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 77 S.Ct. 502, 1 L.Ed.2d 438 (1952), the form of the order is nevertheless subject to judicial review. The remedy selected by the FTC must bear a reasonable relationship to the unlawful practices found to exist. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965). The prohibitions of an order must be "clear and precise in order that they may be understood by those against whom they are directed." *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 726, 68 S.Ct. 793, 815, 92 L.Ed. 1010 (1948).

[15,16] In this case the opinion of the Commission contains no reference to any venue problem which might serve to justify the breadth of the order's prohibition to include suits against Illinois residents. The rationale relied upon by the majority of the Commissioners to find that Spiegel had engaged in an unfair trade practice within Section 5 of the Federal Trade Commission Act dealt exclusively with Spiegel's use of long-arm jurisdiction and does not support the extension of the remedy to include suits filed in Illinois against Illinois mail order customers.

The scope of the order entered by the FTC against Spiegel is not reasonably related to the practices involving the Illinois long-arm statute which the FTC condemned. Neither the complaint nor the Commission's opinion mention or discuss any allegedly unfair abuse of venue by Spiegel against Illinois customers.[11] Under **[296]** these

[11] The FTC contends that this entire line of argument is improper since it was not formally argued in the proceedings below. An examination of the record, however, reveals that there was no indication that the order would be construed to include suits against Illinois residents until the Commission's final order issued. Consideration by an

(Continued)

circumstances, the FTC's order, to the extent that it may be construed to apply to suits brought in Illinois against Illinois residents, is inconsistent with the complaint and is not supported by the reasoning in the Commission's opinion. Therefore we are of the opinion that the Commission's order should not be enforced insofar as it relates to Illinois consumers who are sued in a county courthouse which is a reasonable distance from their place of residence.[12]

[17] In modifying the order we do not seek to usurp the role of the Commission. Our effort is not to rewrite the Commission's order but rather to enforce the order as it is supported by the facts. Justice requires that enforcement be granted only if the order bears a reasonable relation to the violation charged.

As this Court has previously stated in *Allen B. Wrisley Co.* v. *Federal Trade Commission*, 113 F.2d 437, 442 (7th Cir. 1940):

> We now come to the challenged order itself, which, we think, is broader than the issue tendered by the complaint, and the theory on which the case was tried. As was said in *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, 427, 40 S.Ct. 572, 574, 64 L.Ed. 993: ". . . . such an order should follow the complaint; otherwise it is improvident and, when challenged, will be annulled by the court."

[18] The Commission's order in this case also requires Spiegel to "prepare and maintain a summary of suits instituted, pending, terminated, or acted upon subsequent to judgment, involving the collection of retail credit accounts . . ." for a period of two years. The Commission seeks to justify this burdensome record-keeping requirement of its order by arguing that it is impossible for the FTC to monitor Spiegel's suits across the country.

However, we believe the order should be commensurate with the violation. Accordingly, enforcement of this portion of the Commission's order will be granted only insofar as it requires Spiegel to report suits

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appellate court of an issue not previously raised before the Commission is not always prohibited by the rules. As the Supreme Court stated in *Hormel* v. *Helvering*, 312 U.S. 552, 557, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941):

> "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. See *Blair* v. *Oesterlien Machine Co.*, 275 U.S. 220, 225, 48 S.Ct. 87, 88, [72 L.Ed. 249] (1927).
>
> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

[12] The difficulty with the Commission's order is that it prohibits Spiegel from suing, in DuPage County, someone who lives in Cook County. Actually it might be more convenient for the consumer to defend the action in DuPage County. Since the complaint did not allege any venue problems with suits against Illinois residents we see no reason for the FTC to abridge Spiegel's right to bring suit wherever the law allows. On appeal the FTC argues that if the order is not enforced in *toto*. Spiegel could sue a Cook County resident in Cairo, Illinois, hundreds of miles away from his residence. In this extreme example, such conduct by Spiegel would amount to a violation of Section 5. However, absent such an allegation in the complaint, the Commission has no authority to issue a blanket order.

instituted in a county other than where the defendant resides, or where the defendant signed the contract sued upon.[13] The reason for this choice of forum should also be explained in the report. Such a modification of the order should relieve Spiegel of cumbersome reporting, while at the same time allowing the FTC to monitor the suits it seeks to prohibit. In addition, the FTC can determine whether Spiegel is attempting to abuse the venue requirements of Illinois law in its suits against Illinois consumers in counties where they do not reside.

The order of the Commission is enforced as modified.

[13] The report should include any suits instituted in a county other than where the defendant resides, or in a county where the defendant signed the contract sued upon, brought either by Spiegel, a collection agency, or other agent operating on Spiegel's direction.

FEDERAL TRADE COMMISSION v. FOOD TOWN STORES, INC., et al.*

Misc. No. 76-8264. F.T.C. Docket No. 9087.

(United States Court of Appeals, Fourth Circuit, August 13, 1976)

1. WHERE IT WAS IMPOSSIBLE TO TIMELY CONVENE COURT OF APPEALS PANEL, SINGLE CIRCUIT JUDGE WOULD RULE OF APPLICATION FOR INJUNCTION.

Application by the Federal Trade Commission for an injunction prohibiting the consummation of a corporate merger pending an appeal from a decision of the district court denying an application by the Commission for a temporary restraining order against the consummation of the merger on the ground that it was in violation of the Clayton Act and the Federal Trade Commission Act would be decided by a single circuit judge where it was impossible to convene a panel of the Court of Appeals in time to hear and decide the application.

2. DISTRICT COURT WAS NOT AUTHORIZED TO RULE AS TO VIOLATION OF ANTITRUST LAWS IN PROCEEDING SEEKING PRELIMINARY INJUNCTIVE RELIEF UNDER F.T.C. ACT.

[1340] In a proceeding under the Federal Trade Commission Act to obtain a temporary restraining order or a preliminary injunction, the district court is not authorized to determine whether the antitrust laws have been or are about to be violated.

3. F.T.C. HAS FIRST INSTANCE ADJUDICATORY FUNCTION OF DETERMINING F.T.C. ACT VIOLATIONS.

The adjudicatory function of determining whether the Federal Trade Commission Act has been violated is vested in the Federal Trade Commission in the first instance.

4. PRESERVATION OF THE STATUS QUO IS THE ONLY REASON FOR SEEKING A TEMPORARY RESTRAINING ORDER OR A PRELIMINARY INJUNCTION UNDER THE F.T.C. ACT.

The only purpose of a proceeding under the Federal Trade Commission Act to obtain a temporary restraining order or a preliminary injunction is to preserve the status quo until the Federal Trade Commission can perform its function of determining whether the antitrust laws have been or are about to be violated.

5. DENIAL OF TEMPORARY RESTRAINING ORDER CONSTITUTED AN APPEALABLE "FINAL ORDER" IN THAT IT NOT ONLY FAILED TO PROVIDE RELIEF SOUGHT, BUT SERVED TO EFFECTIVELY TERMINATE LITIGATION.

Order of district court denying application of the Federal Trade Commission for a temporary restraining order against consummation of a corporate merger on ground that it was in violation of the Clayton Act and the Federal Trade Commission Act operated to effectively terminate litigation and, as such, constituted a "final order" which was appealable, where effect of order not only denied the Commission the only relief which it sought, but effectively operated to

* Reported in 539 F.2d 1339 (1976). For case before the Commission, see 88 F.T.C. 435.

prevent the Commission from carrying out its statutory duty of prohibiting a merger that was allegedly violative of statutory proscriptions.

6. LIKELIHOOD OF SUCCESS AND BALANCING OF PUBLIC EQUITIES REQUIRE CONSIDERATION IN GRANTING INJUNCTIVE RELIEF UNDER F.T.C. ACT.

The granting of injunctive relief under the Federal Trade Commission Act requires a consideration of the likelihood of success as well as a balancing of public equities.

7. "FAILING COMPANY" DEFENSE WAS NOT AVAILABLE WHERE FIRM WAS SHOWN TO BE SOLVENT AND MAKING A PROFIT DESPITE SUBSTANTIAL SHORT-TERM LIABILITIES.

While one of corporations involved in prospective merger may have had some substantial short-term liabilities, where its financial statements, filed in connection with merger, showed that it was nevertheless solvent and profit making, defense that corporation was in such poor financial condition that, in absence of merger, it would cease to be an effective competitor was not available to preclude issuance of an injunction to Federal Trade Commission pending appeal of order denying its motion for a temporary restraining order against merger.

8. IN DETERMINING LEGALITY OF MERGER UNDER CLAYTON ACT, NARROWNESS OF COMPETITIVE MARKET IS IRRELEVANT.

Fact that markets in which firms contemplating merger compete may be small is irrelevant in determining the legality of merger under Clayton Act.

9. F.T.C. IS STATUTORILY ENTITLED TO PRESERVATION OF THE STATUS QUO PENDING ADJUDICATION OF DIVESTITURE ISSUE.

While divestiture may be the ultimate remedy when it is claimed that competitive overlaps between two merging firms are de minimis, the Federal Trade Commission is entitled by statute to preserve the status quo pending the adjudication of issue.

10. IF DIVESTITURE IS PRACTICABLE AND NECESSARY TO AVOID SEC. 7 VIOLATION, IT MUST BE UNDERTAKEN BEFORE MERGER IS CONSUMMATED.

If divestiture is practicable and necessary to avoid a violation of Clayton Act when it is claimed that competitive overlaps between two merging firms are de minimis, it must be undertaken before the merger is [1341] consummated.

11. GRANTING INJUNCTIVE RELIEF WAS NOT PRECLUDED BECAUSE OF PRIVATE INJURIES WHICH MIGHT RESULT IN DELAYING MERGER.

Private injuries that might result from an injunction delaying corporate merger, e.g., lawsuit by one of merging firm's substantial creditors and stockholders, were not of a nature to preclude granting of injunctive relief to Federal Trade Commission pending appeal from order denying its motion for a temporary restraining order against merger.

12. WHERE FIRM WAS NOT BOUND TO CONTINUE ITS DISCOUNTING POLICIES FOLLOWING CONSUMMATION OF MERGER, PUBLIC BENEFIT, ALONE, AS A PERMISSIBLE BASIS ON WHICH TO DENY F.T.C. INJUNCTIVE RELIEF, WAS TOO SPECULATIVE TO RELY ON.

Though one of merging firms has been a discounter in retail grocery business, as a result of which the buying public could purchase more economically at the stores maintained by that firm than at any of its competitors, where firm was not bound to extend, or, it is initially extended, to continue its discounting policies at its stores once merger was accomplished, public benefit to be created as a result of merger

was to speculative to rely on it alone as a permissible basis on which to deny injunctive relief to Federal Trade Commission pending appeal of order denying its motion for a temporary restraining order against merger.

13. WHERE A PRIMA FACIE CASE REGARDING ANTICOMPETITIVE EFFECTS OF MERGER WAS SUFFICIENTLY ESTABLISHED BY STATISTICAL EVIDENCE REGARDING LIKELIHOOD OF SUCCESS AND PUBLIC EQUITIES, AND PRIVATE INJURY THAT MIGHT RESULT FROM INJUNCTION WAS OUTWEIGHED BY SPECULATIVENESS OF PUBLIC BENEFIT BY MERGER, F.T.C. WAS ENTITLED TO TEMPORARY INJUNCTIVE RELIEF.

The Federal Trade Commission was entitled to an injunction pending appeal of order denying its motion for a temporary restraining order and a preliminary injunction against corporate merger on grounds that it was violative of antitrust laws where, giving consideration to likelihood of success and public equities, statistical evidence was sufficient to establish a prima facie case respecting anticompetitive effects of merger, and speculativeness of public benefit to be created as a result of merger outweighed any private injury that might result from injunction.

(Syllabus, with substituted captions, taken from 539 F.2d 1339)

In granting F.T.C.'s request for an injunction pending its appeal of denial of temporary restraining order against corporate merger, court held that where any private injury that might result from injunctive relief was outweighed by the speculativeness of public benefit that might derive from merger, and statistical evidence regarding the likelihood of success and public equities provided a prima facie case regarding the anticompetitive effects of the merger, the F.T.C. was entitled to the injunction.

Application granted.

Robert J. Lewis, Gen. Counsel, *Gerald P. Norton*, Deputy Gen. Counsel, *Gerald Harwood*, Asst. Gen. Counsel, *David M. FitzGerald*, Federal Trade Commission, Washington, D.C., for petitioner.

H. Grady Barnhill, Jr., Winston-Salem, N.C., *Thomas M. Caddell*, Salisbury, N.C., *Rayner M. Hamilton*, New York City, for respondents.

MEMORANDUM AND ORDER

WINTER, *Circuit Judge*.

[1341] [1] Application has been made to me for an injunction pending appeal, pursuant to Rule 8, F.R.A.P., prohibiting the consummation of a merger between Food Town Stores, Inc. (Food Town) and Lowe's Food Stores, Inc. (Lowe's), which is scheduled to become effective by the filing of articles of merger at 5:00 p.m. on August 11, 1976. The district court denied relief, except to grant a temporary stay to provide the Court of Appeals sufficient time to consider and act upon the motion. It is impossible to convene a panel of

the court in time to hear and decide the motion, and I will decide it as a single circuit judge. The motion and the supporting documents, including a brief, and a memorandum in opposition thereto, including supporting papers, have been read and considered, and counsel heard in chambers.

I conclude that an injunction pending appeal should be granted.

FACTS

On August 6, 1976, the Federal Trade Commission (FTC) filed an application in the United States District Court for the Middle District of North Carolina for a temporary restraining order (TRO), and a preliminary injunction pursuant to § 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b)(1976 Cum.Supp.), to enjoin the consummation of a merger between Food Town and Lowe's. The injunction was sought in aid of an FTC administrative proceeding which was instituted on August 4, 1976, challenging the merger as violating [1342] § 7 of the Clayton Act, 15 U.S.C. § 18, and § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The administrative complaint alleged that if permitted to become effective, the merger would eliminate competition between Food Town and Lowe's in six cities or towns of North Carolina and their trading areas, would increase concentration in those markets, would eliminate potential competition in other markets, would eliminate potential competition in other markets in West-Central North Carolina, and would increase barriers to entry into the retail food store business in some or all of the markets involved. The stockholders of both Food Town and Lowe's approved the merger on August 10, 1976, and the merger will become effective upon the filing of the articles of merger with the Secretary of State of North Carolina, or within six days thereafter.

The matter was submitted to the district judge on August 9, 1976, on the papers and affidavits, some of which were not filed until August 8, 1976, and on oral argument. On August 10, 1976, the district court denied the TRO, but enjoined the filing of articles of merger until 5:00 p. m. on August 11, so as to permit the instant application to be made.

FTC's motion presents two questions: the first is whether the order of the district judge is appealable so as to vest jurisdiction in the Court of Appeals to consider granting an injunction pending appeal on its merits, and, second, has FTC shown its entitlement to an injunction pending appeal?

JURISDICTION

Food Town and Lowe's vigorously assert that the order of the district judge denying the TRO is not an appealable order and

therefore the Court of Appeals lacks jurisdiction to grant an injunction pending appeal. Analysis of the merits of this argument must begin with consideration of the statute under which the Commission instituted the proceeding in the district court. The pertinent provisions of § 13 of the Act, 15 U.S.C. § 53, follow:

> Temporary restraining orders; preliminary injunctions
> (b) Whenever the Commission has reason to believe—
> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
> (2) that the enjoining thereof * * * until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon becomes final, would be in the interest of the public—
> the Commission * * * may bring suit in a district court of the United State to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond * * *.

[2–4] It is at once obvious that in a proceeding under § 13, the granting or denial of a temporary restraining order or a preliminary injunction is an end unto itself. The district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in FTC in the first instance. The only purpose of a proceeding under § 13 is to preserve the *status quo* until FTC can perform its function.

[5] Viewed in this light, the conclusion follows that the district court's denial of a TRO effectively terminated the litigation and constituted a final order which is appealable under 28 U.S.C. § 1291. The case is quite like our recent decision in *Commonwealth of Virginia* v. *Tenneco, Inc.*, 4 Cir., 538 F.2d 1026 (February 20, 1976), in which we concluded that since a temporary restraining order effectively granted the plaintiff all of the relief which it sought, the order was sufficiently final to be appealable. Of course, in the instant case the temporary restraining order was denied, **[1343]** but the effect of the denial was to deny FTC the only relief which it sought.

Additionally, the denial of the temporary restraining order is appealable under 28 U.S.C. § 1292. The TRO order was denied after full hearing in which the parties fully participated, and the practical effect of the denial, under the facts of the case, will be effectively to prevent FTC from carrying out its statutory duty of prohibiting a merger which violates § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act. If articles of merger are filed on August 11, 1976, and permitted to become effective, any proceeding in the district court for a preliminary or permanent injunction will be rendered moot. *Commonwealth of Virginia* v. *Tenneco, Inc., supra.* I deem the fact that FTC might subsequently order a divestiture, if the merger is

consummated and if it violates federal anti-trust laws, irrelevant. Divestiture may not be as effective a remedy as prevention of a merger, but in any event, FTC has a statutory duty to *prevent* illegal mergers as well as to disassemble them.

ENTITLEMENT TO INJUNCTION

In passing upon the merits of FTC's motion for an injunction pending appeal, I consider first the factors which may properly be given weight under § 13(b). Counsel for defendants press on me the statements contained in my opinion in *Long* v. *Robinson*, 432 F.2d 977 (4 Cir. 1970). Although *Long* was not cited by the district court in its 18-page order (which counsel for defendants admit was prepared by them at the district court's request and adopted by the court), the format of *Long* was followed in arriving at the decision to deny the TRO. From my examination of the law, I think *Long* largely inapposite.

[6] Section 13(b) prescribes as the test for granting injunctive relief "the interest of the public," and it authorizes a district court to grant injunctive relief when "weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest * * *." The equities to be weighed are not, however, the usual equities in private litigation, to which so much attention was given in *Long*. This is made clear by Conference Committee Report No. 93–924 concerning P.L. 93–153, the legislation which enacted § 13(b) as it presently exists. *See* 2 U.S. Code Cong. and Admin.News, 93 Cong., 1st Sess., pp. 2523, *et seq.* (1973). In speaking of the language which was codified as § 13(b), the Report states:

> 16. Section 408(f) relates to the standard of proof to be met by the Federal Trade Commission for the issuance of a temporary restraining order or a preliminary injunction. It is not intended in any way to impose a totally new standard of proof different from that which is now required of the Commission. The intent is to maintain the statutory or "public interest" standard which is now applicable, and *not* to impose the traditional "equity" standard of irreparable damage, probability of success on the merits, and that the balance of equities favors the petitioner. This latter standard derives from common law and is appropriate for litigation between private parties. It is not, however, appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measure the propriety and the need for injunctive relief.
>
> The inclusion of this new language is to define the duty of the courts to exercise independent judgment on the propriety of issuance of a temporary restraining order or a preliminary injunction. This new language is intended to codify the decisional law of *Federal Trade Commission* v. *National Health Aids*, D.C., 108 F.Supp. 340 and *Federal Trade Commission* v. *Sterling Drug, Inc.*, 317 F.2d 669, and similar cases which have defined the judicial role to include the exercise of such independent judgment. The Conferees did not intend, nor do they consider it

appropriate, to burden the Commission with the requirements imposed by the traditional equity standard which the common law applies to private litigants. (Emphasis in original.) *Id.*, p. 2533.

[1344] For the effect of the 1973 legislation, *see also*, *F.T.C.* v. *Simeon Management Corp.*, 532 F.2d 708 (9 Cir. 1976).

As I view the statute, it prescribes as standards (1) the likelihood of success, and (2) a balancing of *public* equities. I therefore consider them:

A. *Likelihood of Success*

As I view the case, FTC has demonstrated a substantial likelihood of success in the administrative proceedings which have been instituted. I, of course, do not decide the case, but the following considerations lead me to this conclusion.

Section 7 of the Clayton Act, 15 U.S.C. § 18, prohibits mergers which may substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the country. Interpreting this section, the Supreme Court has held that "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence showing that the merger is not likely to have such anticompetitive effects." *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 363, 83 S.Ct. 1715, 1741, 10 L.Ed.2d 915 (1963).

The relevant market is determined by two factors: the product market or "line of commerce" and the geographical market or "section of the country." While it is conceded that Food Town and Lowe's sell the same product, it is argued that they do not serve the same areas. The test under § 7 is: Where, as a practical matter, can the purchaser turn for alternatives? *See United States* v. *Connecticut Nat'l Bank*, 418 U.S. 656, 668, 94 S.Ct. 2788, 41 L.Ed.2d 1016 (1974).

FTC contends that in a predominantly rural region the relevant market is the town or city. The presidents of Food Town and Lowe's dispute this claim, arguing for a smaller market definition, but concede that their stores do serve the same trading areas in "a very limited number of store locations," including some in Winston-Salem, Kannapolis, and Mt. Airy, North Carolina. Of course, if the two chains serve the same markets, no matter how small, their merger must be scrutinized to determine if it may substantially lessen competition, i. e., if it results in a firm controlling an undue share of the market and increases concentration.

FTC's data is computed on the basis of cities and counties. Food Town and Lowe's argue that this is too imprecise an approximation to satisfy the standards laid down in *Connecticut Nat'l Bank*, *supra*.

Beyond this, they apparently concede the correctness of the data. While greater precision may ultimately be required for the FTC to prevail in its administrative proceeding, the available information is sufficient to establish a likelihood of success.

In Winston-Salem, each chain operates three stores. In 1975, Food Town's share of the *city* market was 8.3 percent; Lowe's share was 2.7 percent. Combined, the chains would command 11.0 percent. The combined market share has grown from 5.8 percent in 1972. The top four firms presently control 40.7 percent of the market in Forsyth County, which includes Winston-Salem, up from 28.7 percent in 1972. If the merger is consummated, the top four firms' county market share would grow to 42.9 percent.

In Kannapolis, Food Town operates two stores, Lowe's, one. In 1975, Food Town's share of the city market was 28.6 percent; Lowe's share was 3.7 percent. Combined, the chains would command 32.3 percent. The combined *city* market share has grown from 22.6 percent in 1972. The top four firms presently control 56.3 percent of the market in Rowan County, which includes Kannapolis, up from 54.1 percent in 1972. If the merger is consummated, the top four firms' county market share would grow to 58.4 percent.

In Mt. Airy, each chain operates two stores. In 1975, Food Town's share of the city market was 50.9 percent; Lowe's was 21.6 percent. Combined, the chains would command 72.5 percent, a virtual monopoly. The combined *city* market share has grown from 68.0 percent in 1972. The merger would not affect "top-[1345]four" concentration in the Mt. Airy market, largely because the market is already so highly concentrated.

Both firms have been aggressive competitors in the past. Since 1972, Lowe's has opened markets in three cities in which Food Town operated, and Food Town has opened markets in two cities in which Lowe's operated. Food Town's sales have grown by 160 percent since 1972, Lowe's sales by 123 percent. In contrast, industry sales have advanced only 57 percent in the same period.

This largely undisputed evidence shows that in at least three cities, the grocery business is either already heavily concentrated or is becoming so; that the proposed merger would further increase concentration or result in a near-monopoly; that the market share of the combined firms would range from 11.0 percent to 72.5 percent; and that the firms have in the past been vigorous competitors. Under similar circumstances, the Supreme Court has held a merger of grocery chains to violate § 7, although the resulting firm would command only 7.5 percent of the market. *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966).

[7–10] While statistical evidence is not conclusive, it is sufficient to

establish a *prima facie* case and require the firms seeking to merge to show "that the merger is not likely to have * * * anticompetitive effects." *Philadelphia Nat'l Bank*, 374 U.S. at 363, 83 S.Ct. at 1741. Food Town and Lowe's make two countervailing arguments. First, they argue that Lowe's is in such poor financial condition that absent the merger it will cease to be an effective competitor anyway. While Lowe's may have some substantial short-term liabilities, its financial statements, filed in connection with the merger, show it to be solvent and profit-making. Thus, it is unlikely that the so-called "failing company" defense will be available. Second, it is claimed that the competitive overlaps between the two firms are *de minimis*, and could be cured by divestiture. The fact that the markets in which the firms compete may be small is irrelevant under the Clayton Act, and does not affect the legality of the merger. And while divestiture may be the ultimate remedy, under § 13(b) of the Federal Trade Commission Act, FTC is entitled to preserve the *status quo* pending adjudication. Stated otherwise, I am persuaded that Congress intended that if divestiture is practicable and necessary to avoid a § 7 violation, it must be undertaken *before* the merger is consummated.

B. *Public Equities*

Defendants urged, and the district court ruled, that they would be substantially harmed by interim injunctive relief. Specifically, the district court found that (1) if the merger is not effective within forty-eight hours after August 10, 1976, Lowe's might be subjected to a lawsuit by one of its substantial creditors and stockholders as a result of a contract made with it; (2) if the merger is postponed, Food Town would be required to amend its registration statement with the SEC with regard to its shares to be issued in exchange for shares of Lowe's in accordance with the merger; (3) the market value of Food Town's stock might be adversely affected by any delay, and since the merger agreement permits either party to rescind it if the merger is enjoined, Food Town may be forced or elect to rescind as a result of economic pressures; (4) Lowe's home office and warehouse employees are apprehensive about the effect of the merger, and further uncertainty about whether the merger will become effective may result in loss of personnel; (5) payment of a substantial indebtness of Lowe's, due October 15, 1976, will be made possible as a result of the merger, and any delay in the merger will require Lowe's to find substantial new financing on very short notice; (6) postponement of the merger before the stockholders' meetings might have required the solicitation of new proxies; and (7) an expert witness, on whom defendants would rely, might not be available if disposition of the application for a temporary restraining order is not made promptly.

[1346] [11] All of these reasons go to the *private* injury which may

result from an injunction delaying the merger. I do not minimize them, but I conclude that they are of such a nature that they are not proper considerations for granting or withholding injunctive relief under § 13(b). My conclusion in this respect is reinforced by recognition that many of them would result if any merger is enjoined on the eve of its consummation; yet Congress enacted § 13(b) authorizing injunctive relief, thereby indicating that it thought that little weight should be given to them.

Defendants do advance a consideration which falls into the category of the public interest. The record establishes that Food Town has been a discounter in the retail grocery business and that as a result the buying public can purchase more economically at Food Town than at Lowe's or any of Food Town's other competitors. An officer of Food Town represented that if the merger becomes effective, Food Town's discounting policy will be extended to the former Lowe's stores, and the argument is advanced that the public will thereby be benefited.

[12] Of course, lower retail food prices are in the public interest. I do not question the good faith of the representation by the officer of Food Town, but I am also not unaware that the classic approach of a would-be monopolist is to undersell the market until market control has been obtained and thereafter to adjust prices upwards to profit the successful monopolist. The persuasiveness of the representation made on Food Town's behalf is diluted by the fact that Food Town is not bound to extend, or, if it initially extends, to continue, its discounting policies at the former Lowe's stores. Thus, I deem the public benefit to be created as a result of the merger too speculative to rely on it alone as a permissible basis on which to deny injunctive relief.

[13] Overall, I conclude that the district court's denial of a TRO is under the circumstances of this case a final order appealable under 28 U.S.C. § 1291, or an interlocutory order appealable under 28 U.S.C. § 1292. I am persuaded that on the merits of the administrative proceeding before FTC, FTC has demonstrated a substantial likelihood of success. In denying a temporary restraining order, the district court applied erroneous legal standards in determining whether or not the TRO should issue. When the correct legal standards are applied, I think that FTC has demonstrated that it is in the public interest that interim injunctive relief should be granted. Accordingly, I have granted an injunction pending appeal prohibiting the parties from the consummation of a merger between Food Town and Lowe's. The injunction was entered and was effective at 4:30 p. m. on August 11, 1976.

If any one of the parties is disposed to make a request therefor, I will grant a motion to advance the appeal and direct the clerk to fix an accelerated briefing schedule.

IT IS SO ORDERED.

RETAIL CREDIT CO. v. FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 75–0895. F.T.C. Docket No. 8920.

(United States District Court, District of Columbia, August 17, 1976)

On motion for recovery of attorney fees, Court held that in view of the four criteria specified in the Freedom of Information Act record, (1) the benefit to the public, if any, deriving from the case; (2) the commercial benefit to the complainant; (3) the nature of complainant's interest in the records being sought; and (4) whether the government's withholding of the records sought had a basis in law, an award of attorney fees in this instance would be inappropriate.

Motion for attorney fees and litigation costs denied.

Francis A. O'Brien and *Kenneth E. Krosin*, of *Howrey & Simon*, Washington, D.C., for plaintiff.

Ann S. Duross, Asst. U.S. Atty., Washington, D.C., for defendants.

Before JONES, *District Judge*.

MEMORANDUM AND ORDER

Plaintiff originally sought access, pursuant to the Freedom of Information Act, 5 U.S.C. § 552, to certain records in the custody of the Federal Trade Commission. According to defendants, the request encompassed approximately 20,000 pages of documents, and the Commission originally granted access to 17,000 pages in their entirety. The remaining 3,000 pages, or approximately 620 documents, were withheld in whole or in part by the Commission. Plaintiff brought suit in this Court to obtain access to those 620 documents.

Plaintiff moved for partial summary judgment on June 27, 1975, and the defendants cross-moved for summary judgment based upon an "Index of Documents Withheld" on July 3, 1975. On February 2, 1976, the Court ordered defendants to resubmit a more detailed Index within thirty days, and specified the information to be included in the Index. The Court also ordered all documents similar to the "transmittal" or "assignment" slips withheld under Category V to be disclosed. In the course of resubmitting the Index, defendants decided to release to plaintiff 119 of 620 documents previously withheld. After reviewing the second Index in conjunction with certain documents submitted for *in camera* inspection, the Court on May 10, 1976, granted defendants' motion for summary judgment, although reaffirming its earlier order that the "transmittal" or "assignment" slips in Category V be

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶61,071 at 69,823 (1976–2 Trade Cases).

disclosed. According to defendants, the number of these slips eventually disclosed was five.

Presently before the Court is plaintiff's motion for attorney's fees pursuant to 5 U.S.C. § 552(a)(4)(E), which provides:

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

While the judgment was entered in favor of defendants, the Court noted in doing so that "[e]ntry of summary judgment on behalf of defendants . . . should not be construed to automatically mean defendants alone prevailed." Memorandum and Order filed May 10, 1976, at 6 n. 5. Defendants oppose plaintiff's motion on two grounds. First, they argue that plaintiff has not "substantially prevailed" in this litigation, and therefore the Court is without statutory authorization to award fees in this case. Second, defendants contend that even if the Court finds that plaintiff substantially prevailed, a fee award is inappropriate under the established standards of the Act.

This Court need not decide the first issue presented by defendants' opposition, although the uncontroverted reasons advanced by defendants for the release of 88 of the 119 documents,[1] and the fact that the Court order disclosed only five of the 620 documents at issue, renders defendants' argument a substantial one. Even assuming that plaintiff could be deemed to have substantially prevailed, however, an award of fees would be inappropriate under the applicable criteria.

The language of 5 U. S. C. § 552(a)(4)(E) does not expressly provide standards by which the Court is to exercise its discretion in awarding fees. The legislative history, however, makes clear that the Court should consider, *inter alia*, four criteria to be set forth shortly. Originally, the Senate bill included four criteria intended as guidelines in fee awards. The four criteria deleted from the final bill passed by both houses were nonetheless intended as legislative guidelines for the courts, as explained by the Conference Report:

> The conference substitute follows the Senate amendment, except that the statutory criteria for court award of attorney fees and litigation costs were eliminated. By eliminating these criteria, the conferees do not intend to make the award of attorney fees automatic or to preclude the courts, in exercising their discretion as to awarding such fees, to take into consideration such criteria. Instead, the conferees believe that because existing body of law on the award of attorney fees recognizes such factors, a statement of the criteria may be too delimiting and is unnecessary.

Conf. Rept. 93–1380, 93d Cong. 2d Sess. 9 (1974). Although Congress

[1] Defendants represent by affidavit that 88 documents, previously denied in whole or in part because the third parties mentioned in the documents had been either expressly or impliedly promised confidentiality, were disclosed subsequent to the Court's February 2, 1976 Order because the third parties no longer considered confidentiality to be necessary. See Tobin Aff. at 2. Plaintiff has given the Court no ground to dispute this representation.

did not intend the courts to be limited to consideration of the four criteria outlined in the Senate bill, reference to those factors is clearly appropriate.

The four specified criteria are (1) benefit to the public, if any, deriving from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding of the records sought had a reasonable basis in law. *See* S. Rept. 93–854, 93rd Cong. 2d Sess. 19 (1974). Here, the plaintiff, a large corporate interest, utilizes the Act to strengthen its position as respondent in an agency proceeding.[2] Congress clearly contemplated that in such a situation a fee award generally would be inappropriate. *Id.* Moreover, there has been little if any benefit to the public because of this litigation, no substantial principles of law have been advanced or decided, and with regard to the overwhelming majority of the documents withheld, this Court has found that defendants possessed a reasonable, legal basis for their action. Plaintiff has offered no reason why the general rule intended by Congress should not be followed here. Accordingly, plaintiff's motion will be denied.

In light of the foregoing, it is this 17th day of August, 1976, without a hearing pursuant to Local Rule 1–9(f),

Ordered that plaintiff's motion for attorney fees and litigation costs be and the same hereby is denied.

[2] Plaintiff described its interest in seeking the documents as follows: "the interest of Retail Credit Company in obtaining these records arises out of its position as a respondent in Docket No. 8920. These records will be used by Retail Credit Company in defending the Commission's complaint . . . ." Exhibit A to Complaint.

BEATRICE FOODS COMPANY v. FEDERAL TRADE COMMISSION*

No. 75–1771. F.T.C. Docket No. 8864.

(United States Court of Appeals, Seventh Circuit, August 18, 1976)

1. IN DETERMINING RELEVANT PRODUCT MARKETS, FOR ANTITRUST PURPOSES, TESTS THAT DISREGARD PURCHASES AND CONCENTRATE ONLY ON SELLERS' PRACTICES ARE NOT MEANINGFUL.

   Any test which ignores buyers and focuses on what sellers do or theoretically can do is not meaningful in determining relevant product market for antitrust purposes.

2. FOR ANTITRUST PURPOSES, FORMATION OF A BROAD PRODUCT MARKET IS NOT DISPOSITIVE OF FORMATION OF RELEVANT MARKET.

   Mere fact several products are limited substitutes for one another and thus form a broad product market is not dispositive of whether they form a relevant market for antitrust purposes.

3. WELL-DEFINED SUBMARKETS MAY EXIST WITHIN A BROAD PRODUCT MARKET AND CONSTITUTE PRODUCT MARKETS FOR ANTITRUST PURPOSES.

   While outer boundaries of a product market are determined by reasonable interchangeability of use or cross elasticity of demand between the product itself and substitutes for it, within such broad market well-defined submarkets may exist which, [304] in themselves, constitute product markets for antitrust purposes.

4. RECOGNITION OF SUBMARKET A SEPARATE ECONOMIC ENTITY, QUALITIES AND USES OF PARTICULAR PRODUCT, DISTINCT BUYERS AND PRICES, SENSITIVITY OF PRICE CHANGES, AND SELLER SPECIALIZATION ARE PRACTICAL CONSIDERATIONS IN DETERMINING MARKET BOUNDARIES.

   Practical indicia for consideration in determining boundaries of market in antitrust case are: industry or public recognition of submarket as a separate economic entity; product's peculiar characteristics and uses; unique production facilities; distinct customers; distinct prices; sensitivity to price changes; and specialized vendors.

5. IN DETERMINING ANTITRUST LAW VIOLATION, F.T.C. JUSTIFIABLY CONCLUDED THAT RELEVANT MARKET EMBRACED ONLY BRUSHES AND ROLLERS, NOT ALSO AEROSOLS AND SPRAY EQUIPMENT.

   In determining whether the acquisition by multinational and multiproduct corporation of the third leading manufacturer of paintbrushes and rollers and eighth ranking manufacturer of paint rollers violated antitrust laws, Federal Trade Commission justifiably excluded aerosols and sprayers and determined that the relevant market included only brushes and rollers, notwithstanding fact that aerosols and other spray equipment were interchangeable with brushes and rollers for some limited uses.

6. BOUNDARIES OF RELEVANT MARKET MUST BE DRAWN WITH SUFFICIENT SCOPE TO ENCOMPASS COMPETING PRODUCTS OF THE MERGING

* Reported in 540 F.2d 303 (1976). For case before the Commission, see 86 F.T.C. 1; *modified* 88 F.T.C. 1003.

COMPANIES AND TO RECOGNIZE COMPETITION WHERE IT ACTUALLY EXISTS.

Price/quality distinctions in products may play a role in market definitions for antitrust purposes where articles are clearly sold in separate price groupings that have little or no price sensitivity between them and price differentials may also be significant when they are clearly indicative of such quality distinctions that articles of different prices are not interchangeable for particular purposes; otherwise, boundaries of relevant market must be drawn with sufficient breadth to include competing products of each of the merging companies and to recognize competition where, in fact, competition exists.

7. WHERE THERE WAS NO SHOWING OF DISTINCT PRICE OR CUSTOMER GROUPINGS IN PRODUCT SALES, RECORD FAILED TO SUPPORT CLAIM THAT F.T.C. SHOULD HAVE DIVIDED THE COMBINED BRUSH AND ROLLER MARKET INTO "PROFESSIONAL" AND "DO-IT-YOURSELF" SUBMARKETS.

Record in antitrust action involving corporation's acquisition of the third leading manufacturer of paintbrushes and rollers and the acquisition of the eighth ranking paint roller manufacturer failed to support claim of acquiring corporation that in determining relevant market Federal Trade Commission should have divided the combined brush and roller market into separate "professional" and "do-it-yourself" submarkets based on price and quality distinctions since there was no showing of distinct price groupings or that the lower priced and higher priced items were marketed and sold to distinct groups of customers.

8. CONTRARY TO ACQUIRING COMPANY'S CLAIM THAT METHOD OF DATA COMPILATION WAS FLAWED AND INCOMPLETE, RECORD REVEALED THAT THE DATA SUPPLIED BY THE CENSUS REPORT WAS AS ACCURATE AS POSSIBLE FOR COMPUTING UNIVERSE FIGURES.

Record in action challenging corporation's acquisition of paintbrush and paint roller manufacturer and subsequent acquisition of a paint roller manufacturer disclosed that the census report category supplied as accurate data as possible for computing universe figures, contrary to claim of acquiring corporation that the method of data compilation regarding the paintbrush and paint roller manufacturing market was flawed and resulted in incomplete data upon which to base its determination of concentration.

9. DETERMINATION OF STATUTE VIOLATION IS NOT CONDITIONED UPON FINDING THAT NUMBER OF MARKET COMPETITORS IS DECREASING.

Determination that corporate acquisition of assets of another violated statute prohibiting such acquisition which may substantially lessen competition does not depend on finding that the number of competitors in relevant market is decreasing.

10. RECORD CLEARLY SHOWED THAT ACQUISITION AGGRAVATED AN ALREADY CONCENTRATED MARKET.

Even if the relevant paintbrush and paint roller market had more competitors in years in which multinational and multiproduct company acquired the eighth ranking paint roller manufacturer after previously acquiring the third ranking paintbrush and roller manufacturer than it did 20 years previously, record clearly demonstrated that the acquisition of the paint roller manufacturer aggravated an already concentrated market in violation of antitrust laws.

11. IN ABSENCE OF CLEAR EVIDENCE INDICATING OTHERWISE, A MERGER FOUND TO BE INHERENTLY LIKELY TO SUBSTANTIALLY LESSEN COMPETITION MUST BE ENJOINED.

Merger which produces a firm controlling an undue percentage share of relevant market and which results in significant increase in concentration of firms in that [305] market is so inherently likely to lessen competition substantially that it must be enjoined in absence of evidence clearly showing that merger is not likely to have such anticompetitive effects.

12. PRIOR DIVESTITURE AGREEMENT ENTERED INTO BY A COMPANY IN SAME LINE OF BUSINESS AS DEFENDANT CORPORATION WAS NOT A DECISION ON MERITS, DID NOT ADJUDICATE LEGALITY OF ANY ACTION BY PARTIES THERETO, AND WAS NOT CONTROLLING PRECEDENT FOR LATER ACTION BY F.T.C.

Entry of a consent decree by one corporation agreeing to divest itself of certain acquired assets was not a decision on merits, did not adjudicate legality of any action by any party thereto and was not controlling precedent for later action by Federal Trade Commission challenging the acquisition by defendant corporation of assets of company in same line of business as that involved in a prior consent decree.

13. QUESTIONS NOT PREVIOUSLY RAISED BEFORE AGENCY CANNOT BE ENTERTAINED BY REVIEWING COURT.

Court of Appeals as reviewing court could not entertain questions not previously raised before agency.

14. THERE WAS NO SHOWING OF NEED FOR ISSUANCE OF ADDITIONAL SUBPOENAS, AND REQUESTING CORPORATION HAD BEEN GIVEN AMPLE OPPORTUNITY TO DISCOVER INDUSTRY STRUCTURE WHILE F.T.C.'S LAW JUDGE HAD GRANTED IT TEN SUBPOENAS AND THE COMPANY FAILED TO PRESENT EVEN ONE FIRM REMOTELY APPROACHING THE EIGHT FOUND BY COMMISSION COUNSEL.

Where Federal Trade Commission law judge who granted ten subpoenas for firms in the relevant brush and roller market in connection with challenge to corporation's acquisition of paint roller manufacturer and the defendant corporation was unable to present any firm which remotely approached the eight firms found by Commission's counsel, defendant corporation had been given an adequate opportunity to discover structure of industry and need was not shown for issuance of a large number of additional subpoenas as requested at trial by defendant corporation.

15. F.T.C. ORDER PROHIBITING DEFENDANT CORPORATION FROM ACQUIRING ANY FIRM ENGAGED IN THE MANUFACTURE AND SALE OF MANUALLY POWERED PAINT APPLICATORS WOULD BE MODIFIED BY STRIKING THE WORDS "OR SALE".

Where case challenging acquisition of paint roller manufacturer by defendant corporation centered on those firms which manufactured paintbrushes and paint rollers and the relevant market did not include those firms which purchased brushes and rollers and resold them to consuming public, Federal Trade Commission order, which found acquisition of paint roller manufacturer to be illegal, prohibiting defendant corporation from acquiring any firm engaged in the manufacture or sale of manually powered paint applicator would be modified to strike the words "or sale" therefrom.

(Syllabus, with substituted captions, taken from 540 F.2d 303)

On appeal from F.T.C. divestiture order, court, inter alia, held that the record justified Commission's determination that relevant market encompassed only brushes and rollers, as well as finding that firm's acquisition of paint roller manufacturer a year after is acquisition of a paintbrush and roller manufacturer was in violation of the Clayton Act, but that the order would be modified so that acquisition of firms engaged in sale of manually powered paint applicator would not be prohibited.

Order affirmed.

Edward L. Foote, Chicago, Ill., for petitioner.

Gerald Harwood, D. Barry Morris, Attys., Federal Trade Commission, Washington, D.C., for respondent.

Before CASTLE, *Senior Circuit Judge,* and SWYGERT and CUMMINGS, *Circuit Judges.*

CASTLE, *Senior Circuit Judge.*

Beatrice Foods Company of Chicago, Illinois, asks this court to review the July 1, 1975, opinion and order of the Federal Trade Commission finding Beatrice's acquisition of the assets of Essex Graham Company to be violative of section 7 of the Clayton Act, 15 U.S.C. § 18,[1] and directing divestiture.

I.

Beatrice is a multinational and multiproduct company with traditional emphasis in foods and food-related services. Its recent history, however, is marked by wide diversification into many non-food fields. In this regard, Beatrice acquired the stock and assets of Tip Top Brush Company and its various affiliated companies in July of 1969 and one year later acquired the Essex Graham Company. Tip Top is a leading manufacturer of paint brushes and rollers; Essex manufactures paint rollers.

[306] In October of 1971, the Federal Trade Commission issued an administrative complaint against Beatrice alleging that its acquisitions of Tip Top and Essex violated section 7 of the Clayton Act since their effect may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of "manually-powered paint applicators"[2] in the United States. Beatrice denied the alleged

[1] The pertinent language of section 7 provides:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

[2] This term was defined in the complaint and the order of the Commission as including "paint and varnish brushes; paint rollers including pans, covers, handles, and other accessories sold separately, or as part of a paint roller kit; and

(Continued)

illegality of the acquisitions and a hearing was subsequently held before an administrative law judge.

The administrative law judge determined that paint brushes (including varnish brushes) and paint rollers (together with accessory products) each separately and both together constituted relevant lines of commerce for section 7 purposes. He further found the relevant geographic market to encompass the entire United States.

As to Beatrice's acquisition of Tip Top, the administrative law judge concluded that an insufficient showing had been made by the Commission's counsel that Beatrice was a likely potential entrant into the brush and roller market and that even if it were, elimination of it as a future entrant would not substantially lessen competition. The law judge also declined to find that the acquisition entrenched Tip Top in the market in a manner that would hinder competition by providing Tip Top with access to Beatrice's "deep pocket" for capital expansion loans. However, with regard to Beatrice's acquisition of Essex Graham, the administrative law judge found that the acquisition substantially lessened actual competition in both the combined brush-and-roller market and the roller submarket and that Essex was eliminated as the most likely entrant into the paint brush market. As viewed by the law judge, the "manually powered paint applicator" industry and the roller submarket were both experiencing trends of rising concentration. The acquisition of Essex by Beatrice would result in the combination of the third ranking firm in the combined brush and roller market (Tip Top) with the thirteenth ranking firm (Essex); and the fifth ranking firm in the roller submarket (Tip Top) with the eighth ranking from (Essex). Such an acquisition, the law judge held, would accelerate the already present trend of rising concentration in both markets.[3]

The acquisition of Essex having been found to violate section 7, Beatrice was ordered to divest itself of Essex and further ordered to cease and desist from acquiring any interest in any concern "engaged in the manufacture or sale of manually powered paint applicators" or

miscellaneous paint applicators other than spray equipment and aerosol cans." The Commission labeled the term "infelicitous" and referred instead to "brushes and rollers." For the sake of simplicity, we shall also refer to "brushes and rollers" in this opinion.

[3] The administrative law judge made the following findings regarding market structure. In 1969, Tip Top manufactured 7.6 percent of the shipments in the brush-and-roller market, ranking third. The same year, Essex's shipments constituted 2.3 percent of that market, ranking thirteenth. In 1969, Tip Top also ranked eighth in the roller submarket, manufacturing 3.7 percent of shipments and Essex ranked fifth, manufacturing 7.0 percent of shipments. Prior to the Essex acquisition, there had been a clear increase in concentration in both markets. During the period 1967 through 1969, the market percentage of the top four firms in the brush-and-roller market rose by 12.8 percent from 36.6 percent in 1967 to 41.3 percent in 1969. Over the same period, the market share of the top eight firms rose 18.4 percent, from 52.8 percent in 1967 to 62.5 percent in 1969. The merger of Tip Top and Essex resulted in the 1969 four-firm concentration figure increasing from 41.3 percent to 43.6 percent and the eight-firm figure from 62.5 percent to 64.8 percent. In the roller submarket, the top four firms shipped 58.1 percent of all rollers in 1969. The merger of Tip Top and Essex resulted in Tip Top becoming the third ranking firm in the submarket and the four-firm concentration figure increasing from 58.1 percent to 61.6 percent and the eight-firm figure rising from 78.6 percent to 80.8 percent.

"engaged in the manufacture or sale of raw materials" to such types of companies.

Both parties cross-appealed the administrative law judge's decision; Beatrice contesting the finding that the Essex acquisi[307]tion was unlawful and the counsel for the Commission attacking the finding that the Tip Top acquisition was lawful. The Commission upheld the initial decision of the administrative law judge[4] and adopted his order. Beatrice thereupon sought review of the Commission's decision in this court.

II.

On review, Beatrice advances several arguments for reversal of Commission's decision and order regarding the Essex acquisition. We shall address each.

A.

Beatrice advances a two-pronged attack on the relevant product market definitions determined by the administrative law judge and adopted by the Commission. First, Beatrice contends that the law judge and the Commission erred in defining the relevant product markets to encompass only brushes and rollers and to exclude aerosols and other more sophisticated power spray equipment. Second, Beatrice insists that the law judge and the Commission erred in failing to divide the brush and roller market into separate "professional" and "do-it-yourself" submarkets. We disagree with both contentions.

1.

Beatrice maintains that the evidence presented to the law judge cannot support his exclusion of aerosols and spray equipment from the relevant product market. The market as determined by the law judge, consisting of only brushes and rollers, argues Beatrice, is the result of the law judge and the Commission limiting their analysis to the scope of the market as viewed from the perspective of sellers only and not that of buyers also, as "the law commands."

[1] We, of course, recognize that "any test 'which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful' " in determining a relevant product market. *L. G. Balfour Company* v. *FTC*, 442 F.2d 1, 11 (7th Cir. 1971), quoting *United States* v. *Bethlehem Steel Corp.*, 168 F.Supp. 576, 592 (S.D.N.Y. 1958); see also *Cass Student Advertising, Inc.* v. *National Educational Advertising Service, Inc.*, 516 F.2d 1092, 1095 (7th Cir. 1975), *cert. denied*, 423 U.S.

[4] The Commission found it unnecessary to decide whether the elimination of Essex as a potential entrant into the paint brush submarket amounted to a separate violation of section 7.

986, 96 S.Ct. 394, 46 L.Ed.2d 303 (1975). But we cannot agree with Beatrice that the law judge and the Commission did so ignore the "rivalry for the custom of buyers," *United States* v. *Bethlehem Steel Corp., supra*, 168 F.Supp. at 592, in determining the relevant product market in the instant case.

The administrative law judge found that most of the large manufacturers of brushes also manufacture rollers and most of the large roller manufacturers also manufacture brushes. He also found that brushes and rollers are distributed by the same firms to the same buyers and that both are generally shipped, stocked, merchandized, and promoted together. Aerosols and spray equipment,[5] on the other hand, were found to be manufactured and sold by firms other than those which manufacture and sell brushes or rollers. The law judge found that aerosols and sprays are manufactured utilizing technology, machinery, and raw materials substantially different from those employed in the production of brushes or rollers.

While such findings are certainly useful in determining the relevant market from the sellers' perspective, the law judge entered other findings which formed the basis for determining the relevant market from the buyers' point of view. The law judge found that paint brushes and rollers are **[308]** "interchangeable in use to a very great degree." As to aerosols, however, he found that they are used for "specialized painting applications for which the use of a paint brush or roller would be impractical." Aerosols, he found, are not used for "larger flat surfaces as their cost for such applications would far exceed the cost of applying paint by paint brush or roller." Sprayers, he found, are used to apply paint on "small specialty jobs such as iron work and irregular surfaced items, and by painting contractors for large, outdoor jobs." Thus, it cannot be said that in determining the relevant product market in the instant case the law judge ignored the "custom of buyers."

Beatrice does not dispute any of these findings. Rather, it maintains that the market as defined is incomplete or "gerry-mandered." Beatrice thus argues that these findings cannot support the market as defined by the law judge and the Commission. Beatrice contends that the evidence demonstrates that rollers are interchangeable with brushes for some *but not all* tasks. For instance, while brushes and rollers may be interchangeable for certain jobs such as painting large, flat surfaces, Beatrice points out that they are not interchangeable for other tasks such as painting intricate objects which require applying paint to non-flat, "hard-to-reach" places. With regard to these latter

[5] There are three basic types of sprayers: conventional, airless, and electrostatic. A conventional sprayer is powered by compressed air generated by an air compressor. Airless sprayers employ hydraulic pressure and electrostatic sprayers apply paint to an object by placing an opposite electrical charge on the item to be painted from the electrical charge of the paint.

types of jobs, Beatrice maintains that aerosols and sprayers, and not rollers, are interchangeable with brushes. Beatrice's ultimate conclusion, therefore, is that since rollers, aerosols, and sprayers are interchangeable with brushes for certain tasks but not for others, all three must be included in any product market with brushes rather than just rollers. We disagree.

[2,3] The mere fact that several products are limited substitutes for one another and thus form a broad product market is not dispositive of whether they form a relevant product market for antitrust purposes. In *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962), the Supreme Court stated that while "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it," nevertheless within such a broad market "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Id.* at 325, 82 S.Ct. at 1523. Thus, the question is not whether brushes, rollers, aerosols, and sprayers constitute a market, but whether the Commission could properly find that brushes and rollers alone constitute a line of commerce.

[4,5] To aid in the determination of the boundaries of a market, the Court in *Brown Shoe* set forth several "practical indicia" for consideration in each case. These indicia are (1) the industry or public recognition of the submarket as a separate economic entity, (2) the product's peculiar characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, (6) sensitivity to price changes, and (7) specialized vendors. *Id.* Considering these indicia in the context of the instant case, we conclude that the Commission justifiably excluded aerosols and sprayers in determining the relevant market to include only brushes and rollers.

The administrative law judge found that the industry recognized brushes and rollers as a separate industry as evidenced by the fact that the Bureau of Census categorizes brushes and rollers alone in the same five-digit Standard Industrial Code category. The law judge found that aerosol manufacturers regard themselves as a separate industry. Brushes and rollers were also found to possess certain peculiar characteristics apart from those of either aerosols or sprayers. The former are manufactured from raw materials utilizing a technology vastly different from those employed in the manufacture of aerosols and sprayers. Furthermore, as related earlier, rollers were found to be interchangeable with brushes to a far greater degree than were either

aerosols or sprayers. Also, brushes and rollers were found to possess prices distinct from [309] aerosols or sprayers.[6] Sprayers were found to be priced substantially higher than rollers or brushes. Finally, the law judge found that manufacturers of brushes and rollers do not consider the prices of aerosols or sprayers in setting their prices. Based on these findings, none of which Beatrice attacks as lacking substantial evidence in support, the Commission clearly could determine that brushes and rollers constituted a relevant product market.

This case is very similar to the situation before the Court in *United States* v. *Continental Can Company*, 378 U.S. 441, 84 S.Ct. 1738, 12 L.Ed.2d 953 (1964), involving a merger between a glass container manufacturer and a metal can manufacturer. Although the evidence showed that glass and metal containers were not interchangeable in every end use, and that other types of containers such as plastic, foil, and paper were interchangeable for some end uses, the Court nevertheless held that glass and metal containers properly formed a separate product market, stating:

> Nor are we concerned by the suggestion that if the product market is to be defined in these terms it must include plastic, paper, foil and any other materials competing for the same business. That there may be a broader product market made up of metal, glass and other competing containers does not necessarily negative the existence of submarkets of . . . cans and glass together, for "within this broad market, well-defined submarkets may exist which in themselves, constitute product markets for antitrust purposes." [*Id.* at 457–58, 84 S.Ct. at 1747, quoting *Brown Shoe Co.* v. *United States*, *supra*, 370 U.S. at 325, 82 S.Ct. 1502.]

Similarly, in the instant case the fact that aerosols and other spray equipment are interchangeable with brushes and rollers for some limited end uses does not negative the existence of a separate brush-and-roller market.

2.

Beatrice's second attack against the Commission's market definition is that it erred in failing to divide the combined brush-and-roller market into separate "professional" and "do-it-yourself" submarkets based upon price and quality distinctions between the products manufactured by Tip Top and Essex. Beatrice points out that Tip Top is largely a manufacturer of inexpensive, low-quality brushes intended for home use, while Essex largely manufactures higher-priced and higher-quality rollers intended for professional use. This price/quality distinction, Beatrice contends, results in the absence of competition

[6] While it is true, as Beatrice points out, that an individual aerosol and a small "throwaway" brush are comparatively priced, Beatrice fails to realize that since an aerosol is not reusable once it expends its contents, several must be employed to apply the same amount of paint that one brush applies in any one task, thus resulting in quite disparate prices between the two products in practical use.

between Tip Top's brushes and Essex's rollers and accordingly requires their placement in separate submarkets for analysis of the merger.

[6] Prior cases indicate that price/quality distinctions in products may play a role in market definitions where articles are sold in clearly separate price groupings that have little or no price sensitivity between them. See, e.g., *Avnet, Inc.* v. *FTC*, 511 F.2d 70 (7th Cir.), *cert. denied*, 423 U.S. 833, 96 S.Ct. 56, 46 L.Ed.2d 51 (1975). Price differentials may also be significant when they are clearly indicative of such quality distinctions that articles of different prices are not interchangeable for particular purposes. See, e.g., *A. G. Spalding & Bros., Inc.* v. *FTC*, 301 F.2d 585 (3d Cir. 1962). Otherwise, "[t]he boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists." *Brown Shoe, supra*, 370 U.S. at 326, 82 S.Ct. at 1524; see also *American Crystal Sugar Company* v. *Cuban-American Sugar Company*, 259 F.2d 524 (2d Cir. 1958).

[310] [7] In *Avnet*, this court upheld the Commission's determination that the relevant product market consisted solely of new automotive electrical units and excluded rebuilt and reconditioned units, the prices of which varied between 25 and 50 percent below that of new units. This court found that the Commission had satisfied its initial burden on the market issue since there was an "absence of any substantial interaction in price between the two lines." 511 F.2d at 77. Unlike in *Avnet*, here the record does not disclose clearly separate price groupings based on quality distinctions, but rather shows substantial price overlap between so-called "do-it-yourself" and "professional" items. In support of its contention, Beatrice cites a page of a recent Sears, Roebuck & Company catalog advertising "Homeowner Brushes" ranging in price from $4.55 for a four-inch nylon brush to $1.70 for a two-inch nylon brush and "Professional Brushes" priced from $5.67 for a four-inch nylon model to a $2.55 for a two-inch nylon brush. Beatrice has failed to show a significant distinction in the use of a "Homeowner" four-inch brush and a "Professional" two-inch brush which would warrant their placement in separate lines of commerce. To say that these brushes do not compete is to strain the antitrust concept of line of commerce too far. In addition to this lack of distinct price groupings, the record in the instant case does not disclose the same absence of price interaction between differently priced items as was present in *Avnet*.

In *Spalding*, which involved the merger of two athletic goods manufacturers, the Third Circuit upheld the Commission's determination that the manufacture and sale of low-priced athletic products involved an entirely different market from the production and sale of

higher-priced, higher-quality athletic goods. The higher-priced lines of athletic goods were found to compose a distinct market due to their peculiar characteristics and uses, namely: the superior labor and raw materials used in their manufacture, and their particular suitability for use in organized competition. In the instant case, Beatrice has failed to demonstrate the presence of either of these factors in relation to the "professional" line of brushes and rollers. Specifically, the record does not support any contention that higher-priced brushes and rollers are particularly suitable for uses in which lower-priced articles are unacceptable.

Furthermore, the record does not support Beatrice's claim that lower-priced and higher-priced items are marketed and sold to distinct groups of customers. The record discloses that both lower and higher-priced brushes and rollers are distributed through the same types of firms (department, food, variety, hardware, and paint stores) and made available to the same customers. Hence, Beatrice's market attack based on supposed price/quality distinctions in the products Tip Top and Essex manufacture must be rejected as being "unrealistic." See *Brown Shoe, supra*, 370 U.S. at 326, 82 S.Ct. 1502.

B.

Beatrice does not contend that the combination of firms with market shares such as are present in the instant case does not support a finding of illegality under section 7. See, e.g., *United States* v. *Von's Grocery Company*, 384 U.S. 270, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966). Rather, Beatrice advances two basic arguments attacking the Commission's finding of concentration. First, Beatrice quarrels with the accuracy of the figures underlying the finding of concentration, arguing that the data used in the determination are suspect for several reasons. Second, Beatrice contends that concentration within the meaning of section 7 cannot be found as a matter of law unless the record demonstrates that the number of competitors in the relevant market is decreasing.

1.

In the instant case, the universe figures for total shipments by manufacturers in the relevant markets were obtained directly from published Census reports: the 1967 Census of Manufacturers and the Annual [311] Surveys of Manufacturers for 1968 and 1969. Standard Industrial Code 39912 and its subcategories cover shipments of paint brushes and rollers and no other extraneous products. Market shares were obtained by dividing shipments of individual companies by the universe figures obtained from the census reports. Shipments of

individual firms were obtained through interviews and inquiries by a Commission economist who contacted companies known to be in the relevant market. Those companies were asked to list 12 leading companies in the brush-and-roller market. A request for shipment figures was then made of those firms. Each of these companies was also asked to list what it believed to be the 12 leading firms in the market. Any company listed in more than one response was subsequently sent a similar inquiry regarding shipment figures. Twenty-eight firms were eventually surveyed through this process.

[8] Beatrice contends that the Commission's method of data compilation was flawed and resulted in incomplete data upon which to base its determination of concentration. First, Beatrice argues that the data is incomplete in that it covers only the years 1967 through 1969 and not 1970, the year in which the Essex acquisition took place. We fail to find any significance in such a fact. The Essex acquisition took place in July of 1970 and thus the 1969 data was the last complete data available. Beatrice does not contend that the 1970 data would counter or detract in any way from the conclusion of the Commission that there was rising concentration in the relevant markets at the time of the Essex acquisition. Cf. *Brown Shoe*, *supra*, 370 U.S. 343 n.70, 82 S.Ct. 1502. Second, Beatrice argues that the universe figures taken from the census reports are incomplete because the census report categories used by the Commission report only shipment figures from firms where brushes and rollers constitute the primary product of the firm and not the secondary product. Thus, Beatrice contends, the data employed by the Commission does not portray an accurate picture of the universe. The record, taken as a whole, however, indicates the contrary. The legend accompanying the particular census report in question states that it "includes quantities and value of the products reported not only by establishments classified in this industry but also by establishments classified in other industries, and shipping these products as 'secondary' products." Although there appears to be a conflict in the oral testimony on the subject, viewing the record as a whole, as we must under *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), we believe that the census report categories in question supplied as accurate data as possible for computing universe figures.[7]

Pointing out that the administrative law judge found that Tip Top was an "assembler" of rollers as opposed to a "manufacturer" of rollers, Beatrice argues that it was unfair to align Tip Top as a "manufacturer" in direct competition with Essex; or if the Commission

[7] Thus the record does not support Beatrice's contention that the Commission's counsel intentionally excluded from their figures production of brushes and rollers by paint companies. Any such production would have been included in the census figures and any large competitors in the paint companies would have been, and in fact were, surveyed.

aligned Essex as an "assembler," it was unfair to not include other "assemblers" in the Commission's survey. We believe that this argument attempts to read a critical distinction between an "assembler" and a "manufacturer" which does not exist for the purposes of this case. Both an "assembler" of parts manufactured by others and a "manufacturer" of rollers from raw materials were treated identically by the Commission in its survey and data compilation and the relevant figures obtained from the census reports included shipments of both. Beatrice's contention that Tip Top was the only assembler surveyed is of little significance since it was provided ample opportunity to subpoena any firms, including "assemblers," whose shipment figures Beatrice wished to bring to the attention of the law judge and the Commission. The Commission's survey was utilized [312] to determine the leading firms in the market. Beatrice was apparently unsuccessful in pointing out any other "assembler" among those leaders.

The method employed by the Commission's staff to compile data in the instant case was satisfactory and resulted in obtaining as accurate a portrayal of the realities of the marketplace as could reasonably be expected. Although Beatrice may point to various technical flaws in the gathering of the data, "in cases of this type precision in detail is less important than the accuracy of the broad picture presented." *Brown Shoe, supra*, 370 U.S. at 342 n.69, 82 S.Ct. at 1533.

2.

[9–11] Beatrice next argues that the Commission erred in finding concentration in the relevant markets without any analysis of the total number of competitors. Beatrice contends that the Commission's failure to determine the precise number of manufacturers in 1950 and 1970 somehow undermines its decision. Relying on the Supreme Court's decision in *United States* v. *Von's Grocery Company*, 384 U.S. 270, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966), Beatrice argues that concentration cannot be found in a market unless the record demonstrates that the number of competitors is decreasing. In the instant case, Beatrice contends that the number of competitors has increased over the years, thus precluding a finding of concentration. We disagree; neither *Von's Grocery* nor any other case conditions the finding of a section 7 violation on the presence of a continuous decline in the number of competitors in a market. Merely because the market under scrutiny in *Von's Grocery* was "characterized by a long and continuous trend toward fewer and fewer owner-competitors," *id.* at 278, 86 S.Ct. at 1482, does not require the presence of that characteristic in a market before concentration and a violation of section 7 may be found. See, e.g., *FTC* v. *Proctor & Gamble Company*, 386 U.S. 568, 87 S.Ct. 1224, 18 L.Ed.2d 303 (1967). Even if the market here had more competitors in

1970 than it had in 1950, as Beatrice contends the record clearly demonstrates that the acquisition of Essex aggravated an already concentrated market. Compare *Ford Motor Company* v. *United States*, 405 U.S. 562, 570, 92 S.Ct. 1142, 31 L.Ed.2d 492 (1972). A merger "which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363, 83 S.Ct. 1715, 1741, 10 L.Ed.2d 915 (1963).

C.

[12] In 1969, the EZ Paintr Corporation, the leading manufacturer of rollers in the nation (by the Commission's estimate), acquired American Brush Corporation and, in 1970, acquired Masterset Brushes, Inc. and King Paint Roller Company. The Commission filed a complaint against these acquisitions nearly contemporaneously with the filing of the complaint in the instant case. The EZ Paintr action, however, was terminated by the entry of a consent decree wherein EZ agreed to divest all of the paint roller facilities it acquired. Beatrice argues that "the conclusion is inescapable" that "if EZ's acquisitions and their resulting affect [sic] on concentration are lawful, so must Petitioner's acquisition of Essex be lawful." The entering of a consent decree, however, is not a decision on the merits and therefore does not adjudicate the legality of any action by a party thereto. Nor is a consent decree a controlling precedent for later Commission action. Cf. *Montgomery Ward & Co.* v. *FTC*, 379 F.2d 666, 671–72 (7th Cir. 1967). Furthermore, the Commission's findings of concentration in the instant case are not "based, in large part, on conduct condoned by the Commission itself in its *EZ Paintr* action," as Beatrice maintains. As discussed above, the Commission based its analysis in the instant case on data from the years 1967, 1968, and 1969 only and not [313] 1970. Therefore, the only aspect of the EZ Paintr acquisitions that would have played a role in the data analyzed in the instant case would have been the paint brush manufacturing capability of American Brush Corporation which EZ was permitted to retain. Any effect on the concentration found in the instant case due to this, we believe, is not significant enough to taint the Commission's decision or to "bar" its finding of illegality with respect to Beatrice's acquisition of Essex.

D.

[13] Beatrice renews various arguments with regard to numerous

erroneous evidentiary rulings by the administrative law judge. Those rulings involved leading questions, best evidence, refreshing recollection and other objections sustained by the law judge which Beatrice maintains prevented it from receiving a fair hearing. The Commission found no prejudice in the rulings since offers of proof were permitted in each instance and the Commission accepted and considered the offers as evidence of record. The Commission also registered its disapproval with many of the law judge's rulings and in light of this reprimand we need not further comment.[8]

[14] Prior to the hearing, Beatrice requested the issuance of subpoenas *duces tecum* to 383 companies, a request denied by the law judge. During the trial, Beatrice requested and received 10 subpoenas *duces tecum* for each category of companies manufacturing rollers and brushes, sprayers, and aerosols. The law judge informed Beatrice that he would allow the subpoena of any firm believed to be an important factor in the relevant markets which were overlooked by the Commission's survey; he indicated that if Beatrice made a proper showing, additional subpoenas would be granted. Beatrice thereafter sought to subpoena nearly 100 firms. The law judge refused to grant the subpoenas and now Beatrice contends that, by failing to do so, the law judge denied it a fair hearing. We disagree. As this court stated in *Papercraft Corp.* v. *FTC*, 472 F.2d 927, 930 (7th Cir. 1973), "the Commission may properly require a showing of need . . . before it will issue [a large number of] subpoenas *duces tecum* for the purpose of establishing the precise contours of the relevant market in a § 7 case." With the 10 subpoenas granted it for the brush-and-roller market, Beatrice was unable to present any firm which remotely approached the top eight firms found by the Commission's counsel. Hence, we agree with the Commission's counsel that the law judge gave Beatrice adequate opportunity to discover the structure of the industry and the necessary "showing of need" was not made to warrant the issuance of a large number of additional subpoenas.

E.

[15] The fourth paragraph of the order of the Commission prohibits Beatrice from acquiring any firm "engaged in the manufacture or sale of manually powered paint applicators." Beatrice contends that this order is overly broad and not reasonably related to the alleged violation. Beatrice maintains that the unlawful conduct in the instant case was horizontal in nature but that the order is aimed at vertical as

[8] Beatrice argues for the first time on appeal that the administrative law judge denied it the right to examine one of the Commission's witnesses with respect to the company's comparative strength in the "professional" and "do-it-yourself" fields. As a reviewing court, we cannot entertain questions not previously raised before the agency. *Lloyd A. Fry Roofing Co.* v. *FTC*, 371 F.2d 277, 286 (7th Cir. 1966).

well as horizontal integration. Beatrice's argument centers on the order's language "manufacture *or sale*." (Emphasis added.) Thus, Beatrice interprets the order to ban not only the acquisition of manufacturers of brushes or rollers, but also firms which do not manufacture them but rather only sell brushes or rollers manufactured by other firms. The complaint in the instant case alleged that both Tip Top and Essex engaged in the "manufacture, sale, distribution" of products in the brush-and-roller market. Thus the instant case centered **[314]** upon those firms which manufactured such products, but who, of course, sell and distribute their products to others for ultimate sale to consumers. The relevant market for the instant case did not include those firms which purchased brushes-and-rollers and then resold them to the consuming public. The Commission's order, however, appears to include these latter firms. The brief of the Commission's counsel seems to interpret the order to pertain only to manufacturers in the relevant lines of commerce. Nevertheless, to insure that the order is reasonably related to the violations found, the words "or sale" are stricken from the fourth paragraph of the order. Compare *Seeburg Corp.* v. *FTC*, 425 F.2d 124, 129–30 (6th Cir. 1970); *Abex Corp.* v. *FTC*, 420 F.2d 928, 933 (6th Cir. 1970), *cert. denied*, 400 U.S. 865, 91 S.Ct. 98, 27 L.Ed.2d 103 (1970). In all other respects, we approve the order.

III.

For the reasons stated above, the order of the Federal Trade Commission, as modified, is affirmed.

ASSOCIATION OF NATIONAL ADVERTISERS, INC. v. FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 75-0896. F.T.C. File No. 99-238.

(United States District Court, District of Columbia, August 27, 1976)

In a Freedom of Information Act action seeking discovery of documents relating to F.T.C. proposed trade regulation rule for food advertising, court held that it was appropriate to discuss generally the arguments of both parties, so as to provide a framework and justification for reindexing where it ordered F.T.C. to reindex its documents, asserting that it lacked a detailed index on which to base a determination as to the propriety of agency non-disclosure decisions; court resolved six issues with regard to facts and evidence versus opinion; Commission directives; names of outside consultants; possibility of secret law in Commissioners' memoranda; documents withheld under Exemption 7; and the legibility of submitted documents.

Gilbert H. Weil, New York City, *Stephen A. Weitzman*, Washington, D.C., for plaintiff.

Earl J. Silbert, U.S. Atty., *Roger Spaeder*, Asst. U.S. Atty., and *Jeffrey Axelrad*, Atty., Dept. of Justice, for defendants.

Before JONES, *Chief Judge*.

MEMORANDUM

In this action, plaintiff seeks access to approximately 525 documents wholly withheld and 673 documents partially withheld by the Federal Trade Commission following a Freedom of Information Act [FOIA] request for documents relevant to a proposed FTC trade regulation rule for food advertising. Approximately 2,500 documents have been released without deletion to plaintiff.

On July 17, 1975, plaintiff moved for summary judgment, arguing that defendants had violated the FOIA by failing to make the records promptly available, by failing to adequately describe the documents withheld or to sufficiently justify with reasons the refusal to disclose, and by deleting the names of outside expert consultants with whom the FTC communicated in proposing the trade regulation rule. On August 11, 1975, defendants submitted an Index for the 525 documents wholly withheld, and cross-moved for summary judgment, arguing that the Index satisfied the requirements of *Vaughn* v. *Rosen*, 484 F. 2d 820 (D. C. Cir. 1973), and that the documents were properly withheld under exemptions 5, 6 and 7 of the FOIA. On August 29, 1975, plaintiff responded to defendants' cross-motion, contending that defendants were required to submit an Index for the 673 partially withheld

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶61,112 at 70,041 (1976-2 Trade Cases).

documents, that certain of the documents withheld were of no interest to plaintiff and would not be sought in this litigation, but that with respect to the remainder the defendants had improperly invoked exemptions 5, 6 and 7, and that the Court must undertake an *in camera* review of the documents to determine which were properly withheld. On October 14, 1975, defendants prepared an Index of those documents partially withheld, which was submitted to plaintiff on an unspecified date. On December 31, 1975, plaintiff objected to the form and content of the Index in an affidavit by counsel. On January 19, 1976, the motions became ripe for decision when defendants formally submitted the second Index, and further responded to plaintiffs objections.

The two Indexes submitted to the Court by defendants are simply structured. Each document is listed by title, date, author (unless the author is unknown or is an outside expert consultant, in which case his area of expertise is substituted for his name), and a brief summary description of the subject matter of the document. Usually this last part of the document description will be nothing more than "re: Nutrition," "re: Concentrated Protein Supplements," or "re: TRR on Food Advertising." The Index for the partially withheld documents does not indicate what portion or which parts of each document was deleted, unless the name of an outside expert consultant was deleted, which is indicated. A general description of the types of material withheld is found in the memorandum submitted to the Court in support of defendants' motion for summary judgment. The descriptions are divided into nine "classes" of documents, and each document in the Index is related to the class within which it falls by a later affidavit filed by defendants on January 19, 1976. See *Laing Aff.*, Exhibit A to Def. Supp. Mem.

Plaintiff has attempted to indicate which documents it has no interest in obtaining and which it does not seek in this litigation. It has submitted its own copy of defendants' Index of wholly withheld documents, on which it indicates whether it seeks a particular document. Any indication of non-interest, however, is expressly premised upon an assumption that the Court will find that the particular document "contain[s] no more than the indexed description." See Pl's Reply at 2 n. 2. This, of course, would require *in camera* review, a procedure which is inappropriate at this stage of the litigation. If defendants are required to re-index the documents with greater detail and specificity, then plaintiff will be in a better position to determine whether the documents are indeed responsive to its request. Moreover, the Court will be in a better position to adjudge the accuracy of the descriptions if the re-indexing is more specific than it is at present.

Plaintiff also asserts that it is interested only in facts or evidence

contained in the documents withheld. This only begins the inquiry, however, since factual or evidentiary material under certain circumstances is protected from disclosure similar to recommendations or opinions, as will be discussed shortly. Thus, plaintiff's disclaimer of interest in material not constituting facts or evidence is of little aid to the Court.

Finally, plaintiff asserts that it is uninterested in CLASS G documents (administrative information), and does not seek *in camera* review of these documents by the Court. See Pl's Reply at 6. Thus, their releasability *vel non* is no longer an issue and will not be addressed.

The most substantial problem facing the parties and the Court at this time is the lack of a specific and adequately detailed record upon which to base a decision concerning the propriety of defendants' nondisclosure decisions. The memoranda submitted by the parties reflect this lack of specificity and detail, and thus read similarly to general treatises on the FOIA rather than as opposing arguments over the releasability of particular information. At this point, only one issue—the releasability of the names of outside expert consultants—is capable of resolution. Any further decision by the Court must await re-indexing of the documents withheld and a sampling of the documents *in camera*.

It is appropriate, nevertheless, to discuss in some general sense the arguments of both parties in order to provide a framework for the re-indexing, as well as a justification for its need. The arguments can best be discussed in terms of six issues:[1]

(1) The extent to which facts/evidence provided in support of or in relation to an opinion or recommendation by agency personnel or by outside expert consultants is protected from disclosure under exemption 5;

(2) Whether directives from the Commission to its staff contained in the "blue minutes" of the Commission are protected from disclosure under exemption 5;

(3) Whether the names of outside expert consultants contacted by the agency in the course of proposing the trade regulation rule are protected from disclosure under exemption 5 and 6;

(4) Whether memoranda between the various Commissioners can be said to contain or represent "secret law" disclosable under 5 U.S.C. §552(a)(2);

(5) Whether facts/evidence contained in documents memorializing staff discussions or positions concerning ongoing or prospective law enforcement proceedings are properly withheld under

[1] This is not intended as an exhaustive list. Indeed, upon re-indexing, some of these issues may be mooted and others added. These, however, are the major foci of dispute between the parties.

exemption 7(A) or alternatively under exemption 5 as attorney work-product;

(6) Whether defendants must be ordered to provide legible copies of the documents requested and which the defendants have determined to be releasable.

These issues will now be discussed *seriatim*.

(1) Facts/Evidence v. *Opinion*

Plaintiff repeatedly stresses, without indicating particular documents exemplary of its complaint, that it is interested only in "facts," not in the opinion of agency personnel. See Pl's Opp. at 6, 7, 9, 11, 12, 14, 17.[2] Where the expression of an expert or agency staff person cannot arguably be called "opinion," being purely factual information extricable from statements of opinion, plaintiff contends that disclosure is mandated. Pl's Opp. at 7, 11. Further, plaintiff argues that an "opinion may itself be or reflect a fact or evidence, rather than a policy-making articulation," thereby rendering it subject to disclosure. See Pl's Opp. at 8–9. For example, where an expert expresses "an appreciation of public understanding, or misunderstanding, of advertising in general or food advertising in particular," or where the expert expresses his understanding of "the public perception of the need for" regulation of food advertising, plaintiff believes the statements, being informational in nature are "facts" subject to disclosure. Pl's Opp. at 14.

The government responds only in general terms, stating that "[w]here severable factual material exists, the Commission has already released it," and that the undisclosed material is either factual material "inextricably intertwined" with opinion, or is "interpretative and evaluated," and therefore not subject to disclosure. See Def. Supp. Mem. at 7–8.

The myriad questions remaining untouched and unanswered by the failure of the parties to develop an adequate record are apparent from a review of the legal decisions concerning exemption 5. The most recent exemption 5 decision of the Supreme Court, NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975), establishes the general guidelines for the application of exemption 5 to agency material withheld from disclosure. Because exemption 5 protects from disclosure "those documents normally privileged in the civil discovery context," the reviewing court must focus on the particular privilege claimed by the government. 421 U.S. at 149. Generally, the government claims, as it does here, the long recognized "executive privilege" which protects

[2] For this reason, the analysis in this section is limited to the fact/opinion distinction implied in exemption 5. Whether a particular opinion or recommendation not capable of characterization as a "fact" is nonetheless disclosable is not before the Court at this time in light of plaintiff's representation of its position.

from disclosure "the decision making processes of government agencies," and more particularly "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." 421 U.S. at 150. The Court must look to the nature of the documents sought and inquire whether disclosure would inhibit the "frank discussion of legal or policy matters" or otherwise injure "the quality of agency decisions." 421 U.S. at 150–51. If the document includes or embodies communications made after a decision has been made, it would be "difficult to see how the quality of the decision will be affected by forced disclosure of such communications." *Id.* In sum, in order to be protected from disclosure, the document must reflect or embody some pre-decisional communication within or between agencies which is part of a decision making process and which is of such a nature that its disclosure would injure the quality of the decision making process of which it is a part. See also *Renegotiation Board* v. *Grumman Aircraft*, 421 U.S. 168 (1975).

Several subsidiary, categorical distinctions between types of material have grown out of the general approach invoked by the Court in *Sears*. The first major categorical distinction recognized by the Supreme Court was between "materials reflecting deliberative or policymaking processes on the one hand," which would be exempt, and "purely factual, investigative matters on the other." *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 89 (1973). This distinction has been recognized and effectuated in numerous cases by the court of appeals. See *National Courier Ass'n* v. *Board of Governors of the Federal Reserve System*, 516 F.2d 1229, 1242 (D.C. Cir. 1975); *Washington Research Project, Inc.* v. *Department of Health, Education & Welfare*, 504 F.2d 238, 249 (D.C. Cir. 1974); *Montrose Chemical Corp. of California* v. *Train*, 491 F.2d 63, 66 (D.C. Cir. 1974); *Soucie* v. *David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971). Indeed, defendants do not dispute that they are obligated to disclose "purely factual material." See Def. Supp. Mem. at 7.

Not all factual material, however, is automatically disclosable, and defendants rely principally on two exceptions to the general rule of disclosability. First, factual data contained in an inter- or intra-agency memorandum, "if it is inextricable without compromise of the deliberative process," need not be disclosed. See *Washington Research Project*, *supra* at 249; see also *Mink*, *supra* at 91. In other words, if the factual matter is so intertwined with exempt deliberative matter such that deletion of the deliberative matter alone would not operate to protect the deliberative process, then the factual material need not be disclosed. Second, a logical corrollary of the "inextricably intertwined" exception concerns factual material prepared analytically to aid a

decision maker during the deliberative process. For example, in *Montrose Chemical, supra*, the court of appeals held that statistical summaries of factual matter, prepared as an analytical aid to the Administrator of EPA in the course of his deliberations over the registration of DDT, were exempt. The statistical summaries reflected an aide's analysis of a voluminous record prepared publicly before a hearing examiner. The court explained its decision:

> To probe the summaries of record evidence would be the same as probing the decision-making process itself. To require disclosure of the summaries would result in publication of the evaluation and analysis of the multitudinous facts made by the Administrator's aide and in turn studied by him in making his decision. Whether he weighed the correct factors, whether his judgmental scales were finely adjusted and delicately operated, disappointed litigants may not probe his deliberative process.

491 F.2d at 69.

This is not to say that all factual presentations capable of being deemed analytical and part of the deliberative process are automatically exempt. The court in *Montrose Chemical*, and subsequently in *Washington Research Project, supra* and *Vaughn* v. *Rosen*, 523 F.2d 1136 (D.C. Cir. 1975) [*Vaughn II*], has confined the exception in three ways. First, the underlying facts from which the summary or analysis is prepared must otherwise be of public record. *Vaughn II, supra* at 1147 n. 38; *Washington Research Project, supra* at 251 n. 20; *Montrose Chemical, supra* at 70–71. Second, the decision maker cannot have referred to the factual summary as the basis for his decision, which would render the summary "secret law" in the absence of disclosure. *Montrose Chemical, supra* at 70. Finally, the factual summaries must in fact be part of a definable deliberative process, rather than merely informational in nature. *Vaughn II, supra*. Thus, in *Vaughn II*, the court of appeals ordered disclosed "evaluative reports" by Civil Service Commission personnel relating to the manner in which other agency managers and supervisors effect their personnel management responsibilities. Observations of the evaluating team, which disclosed its perception of a supervisor's ability and efficacy, as well as recommendations made by the team for a higher level of supervisory performance, were ordered disclosed because the Government failed in its burden of proof to "define, explain, or limit the 'deliberative process' which the Government seeks to protect." 523 F. 2d at 1146. The Court summarized its perception of exemption 5's protection as follows:

> [T]he document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Put another way, predecisional materials are not exempt merely because they are pre-decisional; they must also be a part of the agency give-and-take—of the deliberative process—by which the decision itself is made.

523 F. 2d at 1144. Indeed, the Supreme Court has recognized as much in its most recent exposition of exemption 5, where it stated that exemption 5 protects "predecisional memoranda *prepared in order to assist an agency decisionmaker in arriving at his decision.*" *Grumman Aircraft, supra* at 184 (emphasis added).

Any attempt to apply these principles to the record as it has been developed in this case in order to determine if plaintiff has been provided with all the facts/evidence which it seeks points up the inadequate specificity and detail requisite to a reasoned decision. The government offers no general explanation of the overall deliberative process—assuming a definable one exists—within which the disputed documents were generated. The Court is left unaware of who makes the final decision to propose the trade regulation rule, what interim decisions are rendered, by whom, and how they affect the final decision, the manner in which the numerous decisions are reached, or their reviewability or effect upon the public.[3] The two Indexes submitted to the Court are so summary as to preclude even an initial determination whether a particular document is indeed predecisional. They do not disclose the purpose for preparing the particular memorandum, its place in any deliberative process which might exist, or whether it is purely informational in purpose and content as plaintiff seemingly argues it might be.[4] See p. 5, *supra*. The actual content of each document is described in only the most summary fashion, often providing the Court with no more idea of the content than "re: Nutrition rule." If there is factual information in a particular document, as defendants imply in their supporting memoranda to the Court, no effort has been made to explain why it is "inextricably intertwined" in such a manner that deletion of the deliberative portions would nonetheless still compromise the deliberative process. And if there are factual summaries or analyses in certain of the documents, as defendants also imply, defendants completely fail to demonstrate that it is otherwise available to the public, that it has not been adopted as the basis for an agency decision, and that it was in fact prepared and submitted to a decision maker as a part of the "give-and-take—the deliberative process," *Vaughn II, supra*, of the agency, as is required by prior case law.

It is not enough in this case, where a mass of material is sought and

[3] At one point, defendants seemingly argue that the deliberative process is only completed upon promulgation of the final trade regulation rule. See Def. Supp. Mem. at 9–10. If the deliberative process were defined so broadly, then virtually all documents would be predecisional. Such a definition does not account for the many interim decisions to which particular documents might more closely be related. In any event, a more detailed description of the entire deliberative process is necessary to determine the relationship of each document to the particular decision or process from which it was generated.

[4] It would be unnecessary and premature at this time to decide whether plaintiff's argument that certain expert "opinion" is more properly characterized as "fact" is meritorious. Such a decision should only be made within the framework of a more detailed and specific record.

refused disclosure by an agency, to simply submit that material to the Court for *in camera* inspection, as plaintiff would have the Court order. In each of the cases set forth and discussed earlier, the background of agency activity from which the documents sought were generated, as well as the relationship of the document to that activity, were vital to a determination of the applicability of exemption 5. Where relatively few documents are at issue, and where they clearly relate to a small number of decisions, a more detailed explanation is not always required and *in camera* inspection can most expeditiously dispose of the parties' claims. But in the instant case, where numerous documents are at issue covering a wide range of activity within the agency over a substantial period of time, a far more detailed explanation is necessary. The Court cannot do the work of the agency, which is peculiarly aware of its own needs, and it cannot fulfill its own office of review of the agency's action, without a particularized explanation of those needs.

(2) Commission Directives

Part of the documents described as "CLASS D" are "Commission minutes constituting staff directives." Def. Mem. at 8. This Court has had occasion to rule on the releasability of similar documents in *Retail Credit Company* v. *FTC* [1976–1 TRADE CASES ¶60,909], C.A. 75–0895, Memorandum and Order filed May 10, 1975, holding that they were exempt under *Ash Grove Cement Company* v. *FTC* 511 F. 2d 815 (D.C. Cir. 1975). In *Ash Grove Cement*, the court of appeals with little explanation stated that such documents "under Exemptions 7 and 5 of the FOIA * * * were protected from disclosure." 511 F.2d at 816. In *Retail Credit Company*, this Court stated that under the rationale of *Vaughn II* such directives would not be exempt, but because the court of appeals had directly ruled on similar minutes in *Ash Grove Cement*, the latter case controlled disposition of plaintiff's claims. See *Retail Credit Company*, *supra* at 2, n. 2. Nothing has changed to alter that result.

To insure that the Commission minutes and staff directives withheld here are similar to those involved in *Retail Credit* and *Ash Grove Cement*, however, they must be indexed, described, and their nondisclosure justified before a final determination concerning their withholding is made. See *Ash Grove Cement*, *supra* at 818.

(3) Names of Outside Expert Consultants

This Court has also had occasion to rule on the releasability of the identities of outside expert consultants in a case similar to this case and brought by the same plaintiff. See *Association of National Advertisers*

v. *FTC*, C.A. No. 75–1304, Memorandum and Order filed July 15, 1976 [hereinafter *ANA I*]. There, the Court held that exemption 5 did not protect the identity of the consultants, although it did protect otherwise exempt advice, recommendations or opinions given by the particular expert to the agency. Nothing distinguishes the two cases, and therefore defendants cannot contend that exemption 5 precludes disclosure of the names, addresses, and other identifying information of outside expert consultants.

In the instant case, defendants make a further claim that exemption 6 protects the names from disclosure, a claim not advanced with respect to the outside expert consultants in *ANA I*. Exemption 6 protects "personnel and medical files and similar files disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Although the exemption 6 claim is new in this case, the Court in *ANA I* did have occasion to rule on its applicability to names of non-experts consulted by the agency in conjunction with the proposed trade regulation rule, and held that exemption 6 was inapplicable, and even if applicable, did not protect the names from disclosure. See *ANA I*, *supra* at 5–9. Similar reasoning applies here, and the Court will order that the names of outside expert consultants be disclosed.

(4) Possibility of Secret Law in Commissioners' Memoranda

Defendants have also withheld from disclosure "memoranda circulated to the Commission by one of its members." Def. Mem. at 8. At least according to the summary description provided by defendants in their memoranda submitted to the Court, it appears that these documents generated by individual commissioners, do not embody any "secret law" of the Commission, but instead represent "recommendations for action to be taken by the Commission." *Id.* While not questioning the good faith of defendants' representations, a more detailed explanation of the contents of these memoranda may reveal that the "recommendations" in fact are "private transmittals of binding agency opinions and interpretations." *Ash Grove Cement*, *supra* at 818 n. 12. If so, then those documents or portions of documents containing such "secret law" would be disclosable. See *Ash Grove Cement*, *supra* at 817–18; *NLRB* v. *Sears*, *supra* at 152–54. There is, of course, no way of knowing whether secret law is contained in these memoranda without a detailed explanation of their content and a justification for the defendants' non-disclosure of each.

(5) Documents Withheld Under Exemption 7

Those documents entitled "Class H Documents" were withheld by the defendants under authority of exemption 7(A), which protects

from disclosure "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings." The documents withheld by defendants are described as "reflect[ing] discussions among the staff of actions brought by the Commission which still are in the process of litigation or investigation." According to defendants, the documents discuss the actual litigation as well as the "implications of those cases for future cases." Def. Mem. at 11.

Defendants argue that, in order to justify nondisclosure of a particular document under exemption 7(A), it is sufficient to show that the document "relate[s] to prospective or ongoing law enforcement proceedings." Def. Mem. at 12. They dispute that any specific showing of harm or interference is necessary to justify invocation of exemption 7(A). Plaintiff argues to the contrary that without a showing that disclosure of a document "would interfere with a particular enforcement proceeding," exemption 7(A) cannot be invoked. Plaintiffs are clearly correct.

Exemption 7 was amended in 1974 to alter the result reached by several courts under the old language of exemption 7. Those courts had held, as recognized by Senator Hart who offered the amendment on the Senate floor, that once it is established "that the document sought is an investigatory file compiled for law enforcement purposes," then the document was automatically exempt. 120 Cong. Rec. 17033. As Senator Hart stated, "[t]he court would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made." *Id.* Senator Hart then made it clear that such was not the intent of Congress, and that the new amendment would make clear that documents compiled for law enforcement purposes would be protected from disclosure only upon a showing that "a concrete prospective law enforcement proceeding *would be harmed* by the premature release of evidence or information" or "that disclosure of the information *would substantially harm* such proceedings by impeding any necessary investigation before the proceeding." *Id.* (emphasis added). Moreover, the determination of interference or harm is to be made only "in the context of the particular enforcement proceeding." *Id.* Similarly, the Conference Report stated that exemption 7(A) would preclude disclosure "only to the extent that the production of such records *would interfere with* enforcement proceedings." Conf. Rep. 93–1200, 93d Cong. 2d Sess. 12 (1974) (emphasis added).

Defendants' argument that exemption 7(A) was intended to protect from disclosure any document which relates to an ongoing or prospective law enforcement proceeding, regardless of the extent of the harm flowing from disclosure, flies in the face of the clear

congressional intent that a showing of specific harm or interference be made. Defendants imply that the documents they seek to protect under exemption 7(A) memorialize conversations between staff relating to particular law enforcement proceedings. Nowhere do they state what those proceedings are, when they commenced, or when they are scheduled to terminate. Nor have they informed the Court of the relationship of each staff member to the proceeding. It might be that the relationship is so tangential that the conversations would constitute little more than speculation by interested observers. If this be the case, then the likelihood that disclosure would harm or interfere with ongoing or "concrete prospective" law enforcement proceedings would be materially less. Similarly, disclosure of statements concerning a prospective enforcement proceeding or investigation that is speculative or unlikely to occur may have no effect on the eventual ability of the FTC to undertake the proceeding or investigation. It is impossible, however, to make these determinations in the absence of a more detailed justification by defendants.[5]

Accordingly, defendants will be required to re-index those documents which it claims are protected by exemption 7(A) to show, with specific factual and evidentiary material (a) that the documents were compiled for law enforcement purposes and (b) that disclosure would interfere with ongoing or prospective law enforcement proceedings, including material showing the present stage of the proceedings, future stages contemplated, both possible and certain to occur, and in nonconclusory terms the effect that disclosure would have on the FTC's ability to pursue and act in those proceedings, both present and future.

(6) Legibility of Documents

Finally, plaintiff has submitted certain samples of documents received from defendants which are illegible, and urge the Court that production of illegible documents is tantamount to no production at all. The salutary nature of such a principle is clear on its face, and defendants will be ordered to resubmit to plaintiff legible copies of those documents which plaintiff reasonably complains are illegible.

An appropriate order is being entered simultaneously with this Memorandum.

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[5] A more detailed Index is similarly necessary to determine whether these documents are privileged as attorney work-product under exemption 5. It is clear that exemption 5 protects attorney work-product, *NLRB* v. *Sears*, *supra* at 159–60, but defendants have provided the Court with no framework within which to determine the privilege's applicability. For example, the Index does not disclose the staff attorney's relationship to the enforcement proceeding, the purpose underlying preparation of the assertedly privileged document, or the nature of the statements contained in the document. In the absence of even these basic elements of the work-product doctrine, no decision can be made as to its applicability.

UNITED STATES OF AMERICA v. CHARLES R. JOHNSON*

No. 75–1959. F.T.C. Docket No. C–1569.

(United States Court of Appeals, Eighth Circuit, August 31, 1976)

1. DOING NOTHING, OR MERELY SUPPLYING SALESMEN WITH COPY OF F.T.C. ORDER DID NOT FULFILL PRESIDENT'S OBLIGATION TO INSURE COMPANY COMPLIED WITH TERMS OF CEASE AND DESIST ORDER.

[710] Where the Federal Trade Commission ordered corporation and individual who was organizer, president and sole stockholder of corporation to refrain from engaging in certain practices in advertising and offering for sale home study courses in the electronic data processing field which the Commission found to be unfair method of competition and unfair and deceptive acts and practices, order imposed on individual an affirmative duty to insure that the corporation would cease using promotional practices which the Commission found to be in violation of the law, and such duty could not be discharged by individual if he simply did nothing, or by providing salesmen with a copy of the order.

2. LIABILITY FOR CIVIL PENALTIES ARISE WITHOUT ANY NECESSITY OF SHOWING MALICIOUS INTENT IN VIOLATIVE PRACTICES, AND GOOD FAITH EFFORT TO ASSURE COMPLIANCE BY PRINCIPAL IS USUALLY NO DEFENSE TO CIVIL PENALTY ACTION.

Good faith effort of person to whom Federal Trade Commission cease and desist order is addressed to assure compliance with that order is generally not a defense to an action for civil penalties; where practices in violation of the order have occurred, liability for civil penalties arises without a need for any showing that the practices were intentional or malicious.

3. EFFORTS TO INSURE COMPLIANCE WITH ORDER ARE NOT A DEFENSE TO ACTION FOR CIVIL PENALTIES WHERE VIOLATIONS OF ORDER OCCURRED.

Where violations of Federal Trade Commission cease and desist order occurred, corporate president's efforts to insure compliance with the order were not a defense to action for civil penalties.

4. IF AGENT IS ACTING WITHIN SCOPE OF AUTHORITY, PRINCIPAL CAN USUALLY BE HELD ACCOUNTABLE FOR AGENT'S ACTIONS.

Generally, a principal can be held liable for the actions of his agent if the agent is acting within the scope of his apparent authority.

5. INDIVIDUAL CIVIL PENALTIES WERE PROPERLY ASSESSED AGAINST OFFICIAL WHO WAS SOLELY RESPONSIBLE FOR ESTABLISHING CORPORATE POLICY AND DIRECTING COMPANY'S OPERATIONS.

Where individual was organizer, sole stockholder and chief executive of corpora[711]tion and was responsible for establishing the policy and directing the operations of the company, and where Federal Trade Commission cease and desist order included him individually, and violations of the order occurred, appropriate civil penalties were properly assessed against him individually.

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* Reported in 541 F.2d 710 (1976); rehearing and rehearing en banc denied Sept. 21, 1976. For case before the Commission, see 76 F.T.C. 181.

(Syllabus, with substituted captions, taken from 541 F.2d 710)

On appeal from a civil penalties ruling, court held, inter alia, that where violations of F.T.C. order occurred, civil penalties were properly levied against company's president, who was individually included in the order, and was solely responsible for corporate policy and operations; and his efforts to ensure compliance—by furnishing sales personnel with a copy of the order—was no defense against present proceedings.

Affirmed.

Theodore F. Schwartz, Clayton, Mo., for appellant.

Susan J. Atkinson, Atty., Dept. of Justice, Washington, D.C., for appellee; *Thomas E. Kauper*, Asst. Atty. Gen., *Carl D. Lawson*, Atty., Dept. of Justice, Washington, D.C., on brief.

Before HEANEY and HENLEY, *Circuit Judges*, and SCHATZ, *District Judge*.*

SCHATZ, *District Judge*:

The United States brought suit pursuant to 15 U.S.C. § 45(*l*) against Charles R. Johnson for civil penalties for twenty violations of a cease and desist order issued by the Federal Trade Commission and for an injunction requiring Johnson to comply with the order. The District Court[1] found that the Federal Trade Commission order was directed against both Technical Education Corporation (T.E.C.) and Johnson who was responsible for the actions of the T.E.C. salesmen, that the order had been violated on twenty occasions, and that providing a copy of the cease and desist order to T.E.C. salesmen was not a defense to the action. Johnson was fined a total of $40,000 and permanently enjoined from violating the terms of the F.T.C. order. Johnson appeals, arguing that he should not be held individually liable for the violations. We affirm the District Court.

Mr. C. R. Johnson was the president and sole stockholder of Technical Education Corporation, a company organized by Johnson to promote and to conduct home study courses in the field of data processing. The Federal Trade Commission consent decree of July 29, 1969, which became effective October 9, 1969, directed T.E.C., its officers, agents and employees, and Johnson, individually and as an officer of the corporation, to cease utilizing specific promotional methods which were found to be unfair methods of competition and unfair and deceptive acts and practices in violation of the Federal Trade Commission Act.

The propriety of including a person both as an individual and as a

* The Honorable Albert G. Schatz, United States District Judge for the District of Nebraska, sitting by designation.

[1] The Honorable James H. Meredith, Chief Judge, United States District Court for the Eastern District of Missouri.

corporate officer in a cease and desist order has consistently been upheld in instances where the person included was instrumental in formulating, directing and controlling the acts and practices of the corporation. *F.T.C.* v. *Standard Education Society*, 302 U.S. 112, 58 S.Ct. 113, 82 L.Ed. 141 (1937); *Standard Distributors* v. *F.T.C.*, 211 F.2d 7 (2d Cir. 1954); *Benrus Watch Company* v. *F.T.C.*, 352 F.2d 313 (8th Cir. 1965).

[712] Johnson did not directly challenge his inclusion in the July 29, 1969, order by appeal and does not urge its impropriety in this action. Nor does he challenge the finding of the lower court that the alleged violations did occur. His position is that he attempted in good faith to assure compliance with the F.T.C. order by informing T.E.C. salesmen of the order, that any subsequent violations of the order by T.E.C. employees can only be attributed to the corporation, and that as a result he should not be held individually responsible for the acts of those who are not his agents.

[1] The Federal Trade Commission in the interests of protecting the public against methods of unfair competition and unfair and deceptive trade practices ordered T.E.C. and Johnson to refrain from engaging in certain practices in advertising and offering for sale home study courses in the electronic data processing field. The effect of this order was to impose on Johnson an affirmative duty to assure that T.E.C., the company which he founded, owned and operated, would cease using the promotional practices which the F.T.C. found to be in violation of the law. This duty could not be discharged by Johnson if he simply did nothing. *See in Re Dolcin Corp.*, 101 U.S.App.D.C. 118, 247 F.2d 524 (1956), *cert. denied*, 353 U.S. 988, 77 S.Ct. 1285, 1 L.Ed2d 1143 (1957).

Johnson argues that by providing each salesman with a copy of the F.T.C. order he acted in good faith to assure compliance with the order. But from the evidence presented in the court below, it clearly appears that this effort was superficial at best. The order was a small part of the sales packet provided to new salesmen when they were hired. Its import appears not to have been emphasized in the process of training new salesmen. While Johnson formulated, directed and controlled the operations of T.E.C., the evidence indicates widespread use of methods of solicitation of prospective customers which were specifically prohibited by the cease and desist order. The philosophy communicated to T.E.C. salesmen was to enroll any person who could "walk and chew gum at the same time." In short, we are not persuaded that Johnson in good faith did everything in his power as the chief executive of T.E.C. to assure compliance with the F.T.C. order.

[2] In any case the good faith effort of the person to whom the cease and desist order is addressed to assure compliance with that order is generally not a defense to an action for civil penalties for violation. *See*

United States v. *Beatrice Foods Company*, 344 F.Supp. 104 (Supp.Op. 351 F.Supp. 969) (D.Minn.1972), *aff'd*, 493 F.2d 1259 (8th Cir. 1973), *cert. denied*, 420 U.S. 961, 95 S.Ct. 1350); *United States* v. *Ancorp National Services, Inc.*, 516 F.2d 198 (2d Cir. 1975), *affirming* 367 F.Supp. 1221 (S.D.N.Y. 1974); *Guziak* v. *F.T.C.*, 361 F.2d 700 (8th Cir. 1966); *United States* v. *Vitasafe Corporation*, 212 F.Supp. 397 (S.D.N.Y.1962), and *United States* v. *H. M. Prince Textiles, Inc.*, 262 F.Supp. 383 (S.D.N.Y.1966). The Federal Trade Commission Act was designed to protect the public from unfair trade practices. Where such practices have occurred, liability for civil penalties arises without a need for any showing that the practices were intentional or malicious. See the cases cited, *supra*.

[3] In view of the lower court's uncontroverted and correct determination that the alleged violations of the cease and desist order did occur, the Court properly determined that Johnson's efforts to insure compliance with the order were not a defense to the instant action.

[4] The only question remaining is whether liability can be imposed upon Johnson individually for these violations. It is generally true that a principal can be held liable for the actions of his agent if the agent is acting within the scope of his apparent authority. Thus, the Second Circuit in *Standard Distributors* v. *F.T.C.*, 211 F.2d 7 (2d Cir. 1954), held a corporation responsible for the misrepresentations of its salesmen in violation of the direct instructions of the company, stating:

> [The salesmen] were nevertheless the authorized agents of the corporate petitioners * * * to sell the books. The misrepresentations they made were at least within the apparent scope of their authority and part of the inducement by which were made sales that inured to the benefit of the corporate petitioner. Unsuccessful efforts by the principal to prevent such misrepresentations by agents will not put the principal beyond the reach of the Federal Trade Commission Act. *Id.* at 13. See also *Goodman* v. *F.T.C.*, 244 F.2d 584 (9th Cir. 1957).

In *Standard Distributors*, the Court, speaking through Judge Learned Hand, went on to extend the responsibility for those misrepresentations to the chief officer of the corporation stating:

> We [interpret] [*F.T.C.* v. *Standard Education Society*] as meaning that [a cease and desist order] may include those officers of a corporation who are in top control of the activities that the Commission [713] finds to have violated the Act * * * It is indeed true that this results in holding such an officer responsible for the conduct of those who are not his agents; and moreover, that it deprives him of the immunity that the incorporation of a venture ordinarily gives to the incorporators. However, we do not see that it is any severer a responsibility than that of a principal for the conduct of its agent within the scope of an "apparent authority" that he may have done his best to circumscribe. * * * [S]ince the principal has selected the agent to act in a venture in which the principal is interested, it is fair, as between him and a third person, to impose upon him the risk that the agent may exceed his instructions * * * . Much the same

argument seems to us to be permissible, when, as here, no agency exists. [The president of the corporation] had the entire control over what the salesmen should do and say, so far as any control was possible at all; and the order imposes no greater burden on him than it would have, if he had been a formal principal; for the salesmen did not exceed their "apparent authority." *Id.* at 15.

[5] This Court finds the reasoning of Judge Hand persuasive in the instant case. Johnson was the organizer, sole stockholder and chief executive of Technical Education Corporation. The evidence indicates that he was responsible for establishing the policy and directing the operations of the company. When he acted, the corporation acted.

Inasmuch as the order of the Federal Trade Commission properly included Johnson individually, and inasmuch as the violations of the order did occur, the District Court properly assessed the appropriate penalties against Mr. Johnson individually.

The judgment is affirmed.

NATIONAL AUTOMOBILE DEALERS ASSOCIATION et al. v. FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 76–149. F.T.C. File No. 99–316.

(United States District Court, Middle District of Louisiana, September 2, 1976)

1. RULE PROMULGATED AFTER EFFECTIVE DATE OF AMENDMENTS TO F.T.C. ACT WAS "PRESCRIBED" UNDER F.T.C.'S AUTHORITY PURSUANT TO SECTION OF AMENDMENTS MAKING REGULATIONS REVIEWABLE ONLY IN COURTS OF APPEAL.

[31] Where Federal Trade Commission, pursuant to its authority under section of Federal Trade Commission Act, proposed certain regulation relating to consumer credit transactions, where such section of Act was subsequently amended so as to abolish Commission's rule-making authority under section, and where, after amendments became effective, Commission promulgated regulation, regulation was "prescribed" under Commission's authority pursuant to amendments to Act for purpose of section making regulations judicially reviewable only in Courts of Appeal.

2. DESPITE "SAVING PROVISION" OF AMENDMENTS, AND FACT THAT PREAMENDMENT RULEMAKING PROCEDURE HAD BEEN UTILIZED, DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION WHERE REGULATION WAS PROMULGATED SUBSEQUENT TO EFFECTIVE DATE OF AMENDMENTS AND PURSUANT TO THEIR AUTHORITY.

Where Federal Trade Commission proposed regulation under authority of statute subsequently changed by amendments which eliminated Commission's rule-making authority under such statute but where regulation was promulgated subsequent to effective date of amendments and pursuant to authority of amendments, provision of amendments that any regulation prescribed under authority of amendments was judicially reviewable only in courts of appeal applied, even though preamendment rule-making procedure had been employed and despite "savings provision" of amendments, so that district court lacked subject matter jurisdiction of action seeking injunctive relief restraining enforcement of regulation.

(Syllabus, with substituted captions, taken from 421 F.Supp. 31)

In dismissing a petition of injunctive relief from an F.T.C. regulation, court held that it lacked subject matter jurisdiction where disputed rule, proposed pursuant to F.T.C.'s previous authority, was promulgated under amendments subsequently enacted, which mandated that actions challenging rules be brought in Courts of Appeal.

Suit dismissed.

Herschel C. Adcock, Adcock & Dupree, Baton Rouge, La., *Glenn A.*

* Reported in 421 F.Supp. 31 (1976).

Mitchell, Bazil J. Mezines, Michael G. Charapp, Stein, Mitchell & Mezines, Washington, D.C., for plaintiffs.

Cheney C. Joseph, Jr., U.S. Atty., *Robert S. Leake*, Asst. U.S. Atty., Middle District of Louisiana, Baton Rouge, La., *Robert J. Lewis*, Gen. Counsel, *Gerald P. Norton*, Deputy Gen. Counsel, *Gerald Harwood*, Asst. Gen. Counsel, *L. Wayne Krug, Mark W. Haase*, Attys., Federal Trade Commission, Washington, D.C., for defendants.

Before E. GORDON WEST, *District Judge:*

Plaintiffs, the National Automobile Dealers Association, Miller-Terrell Buick, Inc., and Lindsley-Feiber Motor Co., Inc., seek [32] injunctive relief to restrain the enforcement of a Federal Trade Commission trade regulation promulgated on November 14, 1975, entitled the "Preservation of Consumers' Claims and Defenses" Rule, 16 C.F.R. § 433, also known as the "Seller's Rule." Plaintiffs also seek to reopen administrative proceedings concerning the regulation in order that they may have the benefit of what they believe to be the procedural requirements of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub.Law 93–637, Sec. 202, 88 Stat. 2183. Plaintiffs also ask this Court to declare the regulation a nullity as being in violation of their federally protected rights and in excess of the Commission's authority.

For reasons previously assigned by minute entry on May 12, 1976, this Court denied plaintiffs' motion for temporary injunctive relief, and thus the promulgated regulation, 16 C.F.R. § 433, went into effect on May 14, 1976.

During the hearing on plaintiffs' motion for a temporary restraining order, the defendants questioned this Court's jurisdiction to proceed in this matter, contending that subject matter jurisdiction to review this Federal Trade Commission regulation lies exclusively with the United States Court of Appeals. It is only the question of jurisdiction that is presently before the Court. For the following reasons it is the opinion of this Court that our subject matter jurisdiction is wanting, and that this suit should have been instituted in the appropriate United States Court of Appeals as required by 15 U.S.C.A. § 57a(e)(1)(A), and § 57a(e)(5)(B).

On January 26, 1971, the Federal Trade Commission published notice that it was initiating "a proceeding for the promulgation of a trade regulation rule concerning the maintenance and retention of buyers' claims and defenses in retail consumer installment sales." All interested persons, including the consuming public and potentially affected businesses engaged in retail consumer credit sales, were given notice of their opportunity to present to the Commission their written and oral views, data, and arguments pertaining to the questioned trade practices. Federal Register, Vol. 36, No. 17, Tuesday, Jan. 26, 1971.

Public hearings were held to receive interested parties' views in New York, N. Y. (June 7–9, 1971), Chicago, Ill. (July 12–14, 1971), and Washington, D. C. (Sept. 20–23, 1971).

On January 5, 1973, the Commission proposed a revised regulation and again solicited interested parties to submit data, views, and arguments to the Commission. Federal Register, Vol. 38, No. 3, Friday, Jan. 5, 1973.

On November 14, 1975, following receipt of additional written input from interested parties and the holding of further public hearings in Chicago, Ill. (May 7–9, 1973) and in Washington, D. C. (March 12–15, 1973) concerning the proposed revised version of 16 C.F.R. § 433, the Federal Trade Commission promulgated the regulation as revised, to be effective on May 14, 1976. Federal Register, Vol. 40, No. 223, Tuesday, Nov. 18, 1975. The rule so promulgated, and here complained of, provides, in pertinent part, as follows:

§ 433.2 Preservation of Consumers' Claims and Defenses, Unfair or Deceptive Acts or Practices.

In connection with any sale or lease of goods or services to consumers, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of Section 5 of that Act for a seller, directly or indirectly, to:

(a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face type:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR [33] SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

or, (b) Accept, as full or partial payment for such sale or lease, the proceeds of any purchase money loan (as purchase money loan is defined herein), unless any consumer credit contract made in connection with such purchase money loan contains the following provision in at least ten point, bold face type:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICE OBTAINED WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER. 16 C.F.R. § 433.2.

The effect of this rule is to eliminate the applicability of the holder-in-due-course defenses in cases of consumer credit transactions covered by the regulation.

In promulgating the new regulation, the Commission in its

"Statement of Basis and Purpose" set forth a "history of the proceeding" and therein stated, *inter alia:*

> Accordingly, pursuant to Section 6(g) of the Federal Trade Commission Act *together with Section 202(c) of the Federal Trade Commission Improvements Act, (P.L. 93-637,* Jan. 4, 1975), the Commission herewith announces final adoption of its Trade Regulation Rule pertaining to the Preservation of Consumers' Claims and Defenses in credit-sale transactions. (Emphasis added.)

As seen by this statement, at the time of the Commission's promulgation of 16 C.F.R. § 433 on November 14, 1975, Congress had previously enacted the Magnuson-Moss Warranty—Federal Trade Commission Improvements Act, Public Law 93-637, which amended the Federal Trade Commission Act, 15 U.S.C.A. § 41 et seq., in several respects, and the Commission considered those amendments as at least a part of their authority for promulgating the "Seller's Rule." The Magnuson-Moss Act was approved by the President and the amendments effected thereby became effective on January 4, 1975. The amending provisions of Title II of the Magnuson-Moss Act, which delineate the Commission's rule-making authority and provide for judicial review thereof, are found at 15 U.S.C.A. § 57a.

As correctly pointed out by the Commission, Section 202(b) of the Act amended Section 6(g) of the Federal Trade Commission Act, 15 U.S.C.A. § 46(g), to provide that:

> The Commission shall also have power
>
> * * * * * * *
>
> (g) From time to time to classify corporations and (*except as provided in section 57a(a)(2) of this title*) to make rules and regulations for the purpose of carrying out the provisions of sections 41 to 46 and 47 to 58 of this title. (Emphasis added.)

Section 57a(a)(2) of Title 15, Section 18(a)(2) of the Act, in turn provides in part that:

> The Commission shall have no authority under this chapter, other than its authority under this section [§ 57a(a)(1)(A) & (B)], to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title).* * *

Thus Section 18(a)(2) of the Magnuson-Moss Act, 15 U.S.C.A. § 57a(a)(2), prospectively abolished the Commission's rule-making authority under Section 6(g) of the Federal Trade Commission Act from the effective date of the amendments, January 4, 1975.

Section 18(a)(1)(B) of the Act, 15 U.S.C.A. § 57 a(a)(1)(B), is the Commission's new authority for promulgating regulatory rules. It provides that:

The Commission may prescribe—

* * * * * * *

rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of [34] this title). Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

[1] The Commission's position is that the "Seller's Rule," promulgated after the effective date of the Magnuson-Moss Act, is a rule "prescribed" under the authority of § 18(a)(1)(B) and is therefore judicially reviewable only in the courts of appeals, by the very terms of § 18(e)(5)(B) of the Act, 15 U.S.C.A. § 57a(e)(5)(B), which provides:

The United States Courts of Appeal shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of a rule *prescribed under subsection (a)(1)(B) of this section*, if any district court of the United States would have had jurisdiction of such action but for this paragraph. Any such action shall be brought in the United States Court of Appeals for the District of Columbia circuit, or for any circuit which includes a judicial district in which the action could have been brought but for this subparagraph. (Emphasis added.)

This Court agrees with the Commission that while this particular regulation was "proposed" under § 6(g), prior to the amendments, it was "promulgated" or "prescribed" under § 18(a)(1)(B) as amended by the Magnuson-Moss Act on January 4, 1975, since on the date of promulgation, November 14, 1975, the Commission had no authority save that granted by § 18(a)(1) of the Act to make rules and regulations.

As correctly noted by the plaintiffs, the Magnuson-Moss Act contains a "savings provision," § 202(c)(1), which provides:

The amendments made by subsections (a) and (b) of this section shall not affect the validity of any rule which was *promulgated* under section 6(g) of the Federal Trade Commission Act prior to the date of enactment of this section. Any *proposed* rule under section 6(g) of such Act with respect to which presentation of data, views, and arguments was substantially completed before such date *may be promulgated in the same manner* and with the same validity *as such rule could have been promulgated had this section not been enacted.* (Emphasis added.)

There is, of course, no doubt but that the "Seller's Rule" was *proposed* by the Commission pursuant to authority granted it under Section 6(g) of the Act, and prior to the Magnuson-Moss amendments. There can also be no doubt but that on the effective date of the Magnuson-Moss amendments, January 4, 1975, the "presentation of data, views, and arguments was substantially completed" with respect to the proposed "Seller's Rule." A second round of public hearings had been held in Chicago, Illinois, and in Washington, D. C. in 1973, and some 7,362 pages of written comment concerning the proposed rule had

been received in the course of those hearings. Thus, there is no doubt but that the Commission, in November of 1975, had authority under § 202(c)(1) of the Magnuson-Moss Act to *promulgate* the rule which had been *proposed* under § 6(g) of the Federal Trade Commission Act before its amendment by the Magnuson-Moss Act.

[2] However, we do not view the "savings provision" § 202(c)(1), as broadly as plaintiffs would have us view it. A rule *proposed* under the old Section 6(g), but *promulgated* subsequent to the effective date of the Magnuson-Moss amendments, where the presentation of data, views, and arguments is substantially complete as of that date, may be so done only "in the same manner" as was available under § 6(g) prior to the amendments. We believe that this means that the pre-amendment rule-making procedures, which were substantially changed by the Magnuson-Moss Act, could still be employed in this very limited circumstance. The final adoption statement contained in the Commission's "Statement of Basis and Purpose" meant only that the rule's adoption was accomplished pursuant to the rule-making procedures theretofore available under § 6(g), prior to the amendments, as specifically allowed by the Magnuson-Moss "savings provision," § 202(c)(1). It did not mean that *promulgation* of the rule was accomplished under the authority [35] of § 6(g), since at the time of promulgation on November 14, 1975, the Commission's only rule-making authority was § 18(a)(1) of the Act, 15 U.S.C.A. § 57a(a)(1).

The "savings provision" does not affect the judicial review provision of the amendments, 15 U.S.C.A. § 57a(e)(5)(B), which provides for exclusive jurisdiction in the Courts of Appeals. Indeed, the House Report and the Senate Conference Report both indicate that judicial review of a Commission rule should lie exclusively with the Courts of Appeals. The House Report's discussion of the "savings provision" supports the conclusion that § 202(c)(1) does not extend to the judicial review provisions of the Magnuson-Moss amendments.

> Furthermore, any proposed rule under section 6(g) of the Act with respect to which presentation of data, views and arguments is substantially completed before the date of enactment may be promulgated in the same manner and with same validity as such rule would have been promulgated with had section 202 not been enacted. Of course, if any rule which was prescribed before the date of enactment of the legislation is amended after such date, such amendment shall be made in accord with the revised rulemaking provisions of section 18 of the Federal Trade Commission Act as added by section 202. 1974 U.S. Code Congressional & Administrative News, p. 7730.

Even if we were to view the "Seller's Rule" as having been proposed *and* promulgated under the authority of § 6(g) of the FTC Act, rather than having been proposed under that section but promulgated under the intervening and superseding authority of § 18(a)(1)(B), there would still be solid policy grounds to hold that this Court has no jurisdiction.

While we acknowledge the authority cited by plaintiffs that district court's possessed jurisdiction to review FTC regulations promulgated under § 6(g) prior to the amendments, *National Petroleum Refiners Association* v. *FTC*, 157 U.S.App.D.C. 83, 482 F.2d 672 (1973), *rev'g* 340 F.Supp. 1343 (D.D.C.1972), *cert. den.*, 415 U.S. 951, 94 S.Ct. 1475, 39 L.Ed.2d 567 (1974), such a view today could lead to inconsistent results due to divergent avenues of judicial review. For example, a regulation promulgated under authority of the old § 6(g) would be reviewable by district courts under Section 10 of the Administrative Procedure Act, 5 U.S.C.A. § 706(2), while amendments thereto promulgated under § 18(a)(1)'s authority would only be reviewable in the courts of appeals. As put by the Commission in its memorandum, such "a bifurcated scheme of judicial review" would be very unwise, as a matter of judicial economy, and would be inconsistent with the Congressional intent and the sense of the statute. In short, nothing contained in the "savings provision," § 202(c)(1) of the Act, exempts the "Seller's Rule," proposed under § 6(g) but promulgated under authority of § 18(a)(1)(B) of the Act, as amended, from § 18(e)(5)(B)'s exclusive review provision.

For these reasons, the Court takes note of its lack of subject matter jurisdiction in this matter, and, therefore, this suit will be DISMISSED, at plaintiffs' cost. An order will be entered accordingly.

BLUE RIBBON QUALITY MEATS, INC., et al. v. FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 75CV356–W–4–3. F.T.C. File No. 99–231

(United States District Court, Western District of Missouri, September 9, 1976)

1. LEGALITY OF INQUIRY, RELEVANCE OF SUPOENAED MATERIAL, AND "REASONABLENESS" OF SOUGHT DOCUMENTS CAN BE LITIGATED IN SUBPOENA ENFORCEMENT PROCEEDINGS.

   In an enforcement proceeding before Federal Trade Commission, party subpoenaed can litigate issues concerning whether inquiry is one the agency is authorized by law to make, whether the materials sought are reasonably relevant to the inquiry, and whether the disclosures sought are reasonable, that is, not too broad, indefinite, or unduly burdensome.

2. PRIOR TO CONCLUSION OF PROCEEDINGS, ISSUES SUCH AS AGENCY'S JURISDICTION OVER PARTIES AND COVERAGE OF REGULATORY STATUTE CAN BE RAISED ONLY IN EXCEPTIONAL CIRCUMSTANCES.

   In absence of exceptional circumstances, other issues, such as coverage of regulatory statutes and jurisdiction of agency over party subpoenaed, cannot be raised prior to completion of enforcement proceeding before Federal Trade Commission.

3. APPEAL FOR JUDICIAL DETERMINATION OF RAISED ISSUES IN COURT OF APPEALS MUST BE MADE AFTER COMPLETION OF ENFORCEMENT PROCEEDINGS.

   A judicial determination of issues before Federal Trade Commission in an enforcement proceeding must be made after proceeding has been completed in an appeal to Court of Appeals.

4. ONLY WHERE AGENCY HAS EXCEEDED ITS DELEGATED POWERS, ACTED CONTRARY TO STATUTORY MANDATE, CLEARLY VIOLATED PARTY'S CONSTITUTIONAL RIGHTS, OR WHERE PROCEEDINGS INVOLVE QUESTIONS OF HIGH NATIONAL INTEREST CAN REVIEW OF OTHER ISSUES BE OBTAINED PRIOR TO EXHAUSTION OF ADMINISTRATIVE REMEDIES.

   Exceptions to general rule that administrative remedies must be exhausted before review of other issues can be obtained exist in situations where agency has acted in excess of its delegated powers or contrary to a specific statutory mandate, where proceedings involved questions of high national interest because of their international complexion, and where agency has clearly violated constitutional rights of party seeking injuctive relief against agency proceedings.

5. PLAINTIFFS HAVE ADEQUATE REMEDY AT LAW SO AS TO PRECLUDE CONSIDERATION OF CLAIMS ASSERTED IN ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF WHERE SUCH ISSUES CAN BE RAISED AS DEFENSE IN SUBPOENA ENFORCEMENT ACTION.

   Relevance of information requested in investigative subpoenas issued by Federal Trade Commission in respect to investigation into alleged unfair or

* Reported in 434 F.Supp. 159 (1976).

deceptive acts or practices, burden imposed by subpoenas, requests for allegedly confidential and privileged matters, and constitutional issues under Fourth and Fifth Amendments could be raised as a defense in action to enforce subpoenas and, hence, there was an adequate relief at law so as to preclude consideration of claims in action for declaratory and injunctive relief.

6. ADMINISTERING AGENCY DETERMINES WHETHER PARTY FALLS WITHIN COVERAGE OF STATUTE.

[160] Question whether a party falls within coverage of statute must be determined in first instance by agency responsible for administering statute.

7. OPPORTUNITY FOR REVIEW FOLLOWING COMPLETION OF ACTION CONSTITUTES ADEQUATE REMEDY AT LAW.

An opportunity for review following completion of the agency proceedings constitutes an adequate remedy at law for determining a claim as to jurisdiction of the agency in the proceedings.

8. IN ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF, CONSIDERATION OF JURISDICTIONAL ISSUE WAS PRECLUDED WHERE STATUTORY REVIEW PROCEEDINGS FOLLOWING CONCLUSION OF ENFORCEMENT PROCEEDINGS PROVIDED AN ADEQUATE REMEDY AT LAW.

An adequate remedy at law for jurisdictional claim raised by plaintiffs, namely, that their business was purely intrastate and, thus, beyond the power of Federal Trade Commission in enforcement proceeding, was provided plaintiffs by statutory review proceedings following completion of proceeding and, hence, consideration of jurisdictional issue in action for declaratory and injunctive relief was precluded.

(Syllabus, with substituted captions, taken from 434 F.Supp. 159).

On action for declaratory and injunctive relief against investigative subpoena enforcement, and F.T.C. motion to dismiss, court held that constitutional and statutory issues can be raised in subpoena enforcement proceedings, and consideration of such issues is precluded in action for declaratory and injunctive relief by availability of adequate remedy at law.

Motion granted.

Judgment affirmed, 8th Cir., 560 F.2d 874 (1977).

Clayton A. Chittim, Jr., Kansas City, Mo., for plaintiff.

Mary A. Schneider, Asst. U.S. Atty., Kansas City, Mo., *Robert J. Lewis*, General Counsel, *Gerald Harwood*, *W. Baldwin Ogden*, Asst. Gen. Counsels, F.T.C., Washington, D.C., for defendants.

FINAL JUDGMENT DISMISSING ACTION WITHOUT PREJUDICE

WILLIAM H. BECKER, *Chief Judge*.

This is an action for declaratory and injunctive relief against enforcement by the Federal Trade Commission (hereinafter "FTC") of investigative subpoenas issued to plaintiffs by the FTC. Defendants have moved to dismiss the complaint or, in the alternative, for

summary judgment. Because plaintiffs have an adequate remedy at law, the action will be dismissed without prejudice.

I. *Uncontroverted Facts.*

The following facts are uncontroverted.

On January 30, 1974, the FTC began an investigation of Falcon Enterprises, Inc., and others pursuant to a resolution dated January 30, 1974, Docket No. 742–3080. The resolution stated that the purpose of the investigation was

> [t]o determine whether or not Falcon Enterprises, Inc., Patrick Faltico, and others may be engaged in unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, [Section 45, Title 15, United States Code], including fictitious pricing, false and misleading advertising and deceptive selling practices, in connection with the sale of meats and other related products in various states of the United States.

The FTC directed that "any and all compulsory processes available to it be used in connection with this litigation."

By a subpoena dated September 11, 1974, the FTC directed plaintiff James L. Flanary, the chief executive officer of plaintiffs Blue Ribbon Quality Meats, Inc. (Missouri corporation), and Blue Ribbon Quality Meats, Inc. (Kansas corporation), to appear on October 30, 1974, before F. Kelly Smith and Robert D. Hill, attorneys for the FTC, in connection with the investigation. The subpoena also directed Flanary to produce specified documentary evidence.

Thereafter, plaintiffs filed a motion with the FTC to quash the subpoena, or in the alternative to limit the scope of the subpoena *duces tecum*. On April 14, 1975, the FTC denied plaintiffs' motion and directed plaintiff Flanary to comply with the subpoena on April 25, 1975. The hearing was subsequently rescheduled for May 9, 1975.

On May 5, 1975, plaintiffs filed a motion with the FTC entitled "Motion Challenging Commission's Authority to Conduct Investigation of James Flanary and Blue Ribbon Quality Meats." In the motion, plaintiffs contended that the FTC was without jurisdiction to conduct the investigation of [161] plaintiffs, and requested that the hearing scheduled for May 9, 1975, be stayed and the subpoena *duces tecum* be quashed.

Plaintiffs sought a continuance of the May 9, 1975, hearing from FTC Attorney F. Kelly Smith until the FTC ruled on its May 5, 1975, motion. The motion for a continuance was orally denied by Smith on the grounds that the FTC had jurisdiction over plaintiffs and the materials sought were proper, relevant, and within the scope of the investigation.

After plaintiff's counsel was informed that plaintiffs' May 5, 1975, motion had been denied, this action was filed.

Plaintiffs seek a declaratory judgment that they are beyond the

jurisdiction of the FTC because the business of both the Missouri and Kansas corporations is purely intrastate; that even if the businesses are engaged in interstate commerce, they are "packers" subject to the Packers and Stockyards Act of 1921 and are therefore exempt from FTC jurisdiction under Section 45(a)(6), Title 15, United States Code; and finally that the subpoenas seek materials which are irrelevant and outside the scope of the investigation, are oppressive and burdensome, seek confidential and privileged information, and violate the Fourth and Fifth Amendments to the Constitution of the United States. They contend that they will be irreparably injured unless a declaratory judgment is entered declaring the subpoenas to be invalid and an injunction is issued enjoining the FTC from further proceedings against plaintiffs in FTC Investigation No. 742–3080.

II. *Adequate Remedy at Law*

The FTC is given power to issue investigatory subpoenas by Section 9 of the Federal Trade Commission Act (hereinafter "Act"), Section 49, Title 15, United States Code.[1] Section 10 of the Act, Section 50, Title 15, United States Code, provides in pertinent part that:

> Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

An investigatory subpoena is not self-enforcing. Under Section 9 of the Act, Section 49, Title 15, United States Code, the FTC must seek an order from the federal district court enforcing the subpoena. Refusal to obey a court order directing compliance with the subpoena may be punished as a contempt.[2]

[162] [1–4] In the enforcement proceeding, the party subpoenaed

[1] Section 9 of the Act, Section 49, Title 15, United States Code, provides in pertinent part:

"For the purposes of sections 41 to 46 and 47 to 58 of this title the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing."

[2] Section 9 of the Act, Section 49, Title 15, United States Code, provides in pertinent part:

". . . And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence."

"Any of the district courts of the United States within the juriadiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the Commission, or to produce documentary

(Continued)

can litigate issues concerning (1) whether the inquiry is one the agency is authorized by law to make; (2) whether the materials sought are reasonably relevant to the inquiry; and (3) whether the disclosures sought are "reasonable," i. e. not too broad, indefinite, or unduly burdensome. *See: United States* v. *Powell*, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964); *United States* v. *Morton Salt*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946).[3] In the absence of exceptional circumstances[4] other issues, such as the coverage of the regulatory statute and the jurisdiction of the agency over the party subpoenaed,[5] cannot be raised prior to completion of the administrative proceedings. A judicial determination of these issues will be made after the proceedings have been completed in an appeal to the court of appeals under Section 5(c) of the Act, Section 45(c), Title 15, United States Code, from any adverse action taken by the FTC.

In *Anheuser-Busch, Inc.* v. *Federal Trade Commission*, 359 F.2d 487 (8th Cir. 1966), the United States Court of Appeals for the Eighth Circuit held that a federal district court is precluded from granting declaratory and injunctive relief against an FTC investigatory questionnaire which, the subpoenaed party claimed, sought trade secrets and information not relevant to the FTC investigation. The Court concluded that opportunity to raise such claims in an enforcement proceeding provides an adequate remedy at law, and further that the criminal penalties for neglect or refusal to respond to a subpoena under Section 10 do not attach when the party subpoenaed challenges the validity of the subpoena in good faith. *See also: Reisman* v. *Caplin*, 375 U.S. 440, 84 S.Ct. 508,11 L.Ed.2d 459 (1964). *See generally:* Director, "Jurisdiction of Federal District Court to Entertain Attacks on Federal Trade Commission's Actions," 16 A.L.R.Fed. 361, 412 (1973).

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evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

[3] *See also: E. E. O. C.* v. *Quick Shop Markets, Inc.*, 526 F.2d 802 (8th Cir. 1975); *Federal Maritime Commission* v. *Port of Seattle*, 521 F.2d 431 (9th Cir. 1975); *F.T.C.* v. *Texaco, Inc.*, 170 U.S. App. D.C. 323, 517 F.2d 137 (1975); *S. E. C.* v. *Brigadoon Scotch Distributing Co.*, 480 F.2d 1047 (2nd Cir. 1973); *Genuine Parts Company* v. *F. T. C.*, 445 F.2d 1382 (5th Cir. 1971); *Adams* v. *F. T. C.*, 296 F.2d 861 (8th Cir. 1961); *Comet Electronics, Inc.* v. *United States*, 381 F.Supp. 1283 (W.D.Mo. 1974), *affirmed*, 420 U.S. 999, 95 S.Ct. 1439, 1440, 43 L.Ed.2d 758 (1975); 1 Davis, *Administrative Law Treatise*, Section 3.2 (1958 ed.); Director "Procedural Requirements For Judicial Enforcement of Subpoenas Issued by Federal Trade Commission Under § 9 of Federal Trade Commission Act (15 U.S.C. § 49), 7 A.L.R.Fed. 347 (1971).

[4] Three exceptions have been recognized to the general rule that administrative remedies must be exhausted before review of other issues can be obtained: (1) when the agency has acted in excess of its delegated powers or contrary to a specific statutory mandate, *Leedom* v. *Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958); (2) when the proceedings involve questions of high national interest because of their international complexion, *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963); and (3) when the agency has clearly violated the constitutional rights of the party seeking injunctive relief against the agency proceedings, *Fay* v. *Douds*, 172 F.2d 720 (2nd Cir. 1949). *See generally: American General Insurance Co.* v. *F. T. C.*, 496 F.2d 197 (5th Cir. 1974); *Seven-Up Company* v. *F. T. C.*, 478 F.2d 755 (8th Cir. 1973); *Coca-Cola Company* v. *F. T. C.*, 475 F.2d 299 (5th Cir. 1973).

[5] *See, e. g.: Oklahoma Press Publishing Co.* v. *Walling*, supra; *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 63 S.Ct. 339, 87 L.Ed. 424 (1943); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938); *F. T. C.* v. *Gibson*, 460 F.2d 605 (5th Cir. 1972).

[5] The decision in *Anheuser-Busch, Inc.* v. *Federal Trade Commission, supra,* clearly precludes consideration of plaintiff's claims concerning the relevance of the information requested in the subpoenas to the FTC investigation, the burden imposed by the subpoenas, the requests for allegedly confidential and privileged matters, and the claims that the subpoenas violate the Fourth and Fifth Amendments. These claims can be raised in defense of an action to enforce the subpoenas.

Plaintiffs contend that because they cannot raise the issue whether they are subject **[163]** to the jurisdiction of the FTC in an enforcement proceeding, that remedy is inadequate. They assert that to require them to wait until completion of the administrative proceedings to raise the defense that their business purely intrastate, and thus beyond the power of the FTC,

> . . . would give defendants the right to subject even the smallest and most remote intrastate business to the full burden and harm of the FTC's almost limitless investigatory processes without any hope of legal protection herefrom (sic) until *after* defendants are through with all of their investigations and proceedings, and *after* they have harmed plaintiffs. Plaintiffs' Suggestions In Opposition To Defendants' Motion To Dismiss and Suggestions In Support Thereof, at 3.

[6–8] The Supreme Court, however, has repeatedly held that the question whether a party falls within the coverage of a statute must be determined in the first instance by the agency responsible for administering the statute. See cases cited note 5, *supra.* These cases implicitly hold that the opportunity for review following completion of the agency proceedings constitutes an adequate remedy at law for jurisdictional claims such as those made by plaintiffs. Compliance with the subpoena and the administrative proceeding to determine whether plaintiffs are subject to FTC jurisdiction may impose some burden upon plaintiffs. Nevertheless,

> . . . the rule requiring exhaustion of administrative remedies cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51–52, 58 S.Ct. 459, 464, 82 L.Ed. 638, 644–645.

Because it is concluded that plaintiffs have an adequate remedy at law, the requests for declaratory and injunctive relief will be denied without prejudice to the merits of plaintiffs' factual and legal contentions concerning the validity of the subpoena.

For the foregoing reasons, it is therefore

ADJUDGED that the above-entitled action be, and it is hereby,

dismissed without prejudice to plaintiffs' factual and legal contentions concerning the validity of the subpoena.

BENEFICIAL CORPORATION et al. v. FEDERAL TRADE COMMISSION*

No. 75-2102. F.T.C. Docket No. 8922.

(United States Court of Appeals, Third Circuit, September 8, 1976, *as amended* September 14, 1976)

1. "SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE" STANDARD IS GOVERNING IN REVIEW OF F.T.C. ORDER.

Review of order of Federal Trade Commission entered upon finding of unfair and deceptive trade practices is under the "substantial evidence in the record as a whole" standard.

2. IN DECEPTIVE ADVERTISING CHARGE, INTENT TO DECEIVE IS NOT A FACTOR.

Intent to deceive is not an element of deceptive advertising charge.

3. WHERE INSTANT TAX REFUND ADVERTISEMENTS FAILED TO INDICATE THAT COMPANY WAS MERELY OFFERING ITS NORMAL LOAN SERVICES, UNDER REGULAR CREDIT WORTHINESS STANDARDS, AGENCY'S FINDING OF DECEPTIVE ADVERTISING WAS SUSTAINED BY EVIDENCE.

Evidence sustained Federal Trade Commission finding that advertisements for cash advances from finance company which were referred to as "Instant Tax Refunds" were deceptive and that they did not indicate that customers would have to meet regular standards of credit worthiness and could not obtain the loan simply on the basis of fact that they were entitled to an income tax refund.

4. PRIOR PRACTICE MAY BE A MATTER FOR A CEASE AND DESIST ORDER WHERE DISCONTINUED PRACTICE COULD BE RESUMED.

Where a discontinued deceptive trade practice could be resumed, prior practice [612] may be the subject of a cease and desist order.

5. F.T.C. DETERMINATION THAT DISPUTED ADVERTISEMENTS HAD TENDENCY TO MISLEAD OR DECEIVE WAS SUPPORTED BY CONSUMER TESTIMONY.

Testimony of consumers that, during a particular period of advertising, they did not understand that finance company was offering only its normal loan services with normal finance charges when it engaged in advertising encouraging persons to obtain loans on the basis of their entitlement to income tax refunds sustained determination that the advertising had a tendency to deceive or mislead, even if the particular consumers in question may have been singularly dense, since they were, nevertheless, part of the audience to which the advertisements were directed.

6. TOTAL BAN ON USE OF WORDS "INSTANT TAX REFUND" WAS OVERLY BROAD WHERE F.T.C. CONCLUSION THAT CONTESTED ADVERTISEMENTS COULD NOT BE REVISED SO AS TO RENDER THEM NON-DECEPTIVE WAS NOT SUPPORTED BY EVIDENCE.

Evidence did not support Federal Trade Commission conclusion that there was no possible way for finance company to word its advertising with respect to loans to persons who were entitled to income tax returns so as to render the advertising non-deceptive with respect to fact that the potential borrowers were required to

* Reported in 542 F.2d 611 (1976). For case before the Commission, see 86 F.T.C. 119.

meet the company's normal standards of credit worthiness and could not rely simply on the fact that they were entitled to a refund; Commission's total ban on the use of the phrase "Instant Tax Refund" or any words of similar import was thus overly broad.

7. F.T.C. EXERCISE OF INFORMED DISCRETION IN FRAMING REMEDIAL ORDERS IS NORMALLY BROADLY DEFERRED TO BY COURT.

Court is ordinarily obliged to defer broadly to the Federal Trade Commission's exercise of informed discretion in framing remedial orders which bear some rational relation to the removal or prevention of an establishment violation.

8. A MORE SEARCHING EXAMINATION OF F.T.C. ACTION IN BANNING SPECIFIC LANGUAGE IN ADVERTISING IS REQUIRED BY THE FIRST AMENDMENT.

First Amendment requires an examination of Federal Trade Commission action in banning use of certain words in advertising which is more searching than in other contexts.

9. THE FIRST AMENDMENT MAKES NO COMMERCIAL SPEECH EXCEPTION.

There is no commercial speech exception to the First Amendment.

10. LACK OF COMMERCIAL SPEECH EXCEPTION TO THE FIRST AMENDMENT MEANS THAT, IN IMPOSING A PRIOR RESTRAINT ON PROTECTED COMMERCIAL SPEECH, THE REMEDY CAN BE NO BROADER THAN IS REASONABLY NECESSARY TO FULFILL ITS REMEDIAL PURPOSE; IT DOES NOT MEAN AND ADVERTISER MAY UTILIZE COMMERCIAL SPEECH AS AN INTEGRAL PART OF A PLAN TO VIOLATE AN OTHERWISE VALID LAW.

Fact that there is no commercial speech exception to the First Amendment does not mean that an advertiser may engage in speech which is an essential part of a scheme to violate an otherwise valid law but it does mean that the remedy for the perceived violation can go no further in imposing a prior restraint on protected commercial speech than is reasonably necessary to accomplish the remedial objective of preventing the violation.

11. A REMEDY FOR DECEPTIVE ADVERTISING CAN GO ONLY AS FAR AS IS NECESSARY TO ELIMINATE THE DECEPTION, AND EVEN F.T.C. MUST ACT FROM THE PROPOSITION THAT ANY PRIOR CONSTRAINT ON SPEECH IS SUSPECT.

Federal Trade Commission, like any government agency, must act from the premise that any prior restraint on speech is suspect and that a remedy, even for deceptive advertising, can go no further than is necessary for the elimination of the deception.

12. F.T.C. ORDER REQUIRING TAX PREPARER TO MAKE PARTICULAR DISCLOSURES BEFORE SOLICITING CUSTOMERS' CONSENT TO UTILIZE TAX INFORMATION FOR OTHER PURPOSES IS NOT INVALIDATED BY THE INTERNAL REVENUE CODE PROVISION PROHIBITING ILLEGAL USE OR DISCLOSURE OF TAX INFORMATION.

Provision of the Internal Revenue Code making it a misdemeanor for any tax preparer to disclose information furnished him in connection with the return or to use the information for any purpose other than preparing the return has not preempted the field so as to invalidate Federal Trade Commission order requiring particular tax preparer to make certain disclosures to customers before obtaining their consent for the use of the information for purposes other than tax preparation.

13. F.T.C. DETERMINATION THAT TAX PREPARER FAILED TO MAKE ADEQUATE DISCLOSURES IN SOLICITING CUSTOMERS' AUTHORITY TO USE TAX INFORMATION FOR OTHER THAN TAX PURPOSES WAS SUPPORTED BY EVIDENCE.

Evidence sustained determination of Federal Trade Commission that income tax preparer, which also engaged in making [613] personal loans, had failed to disclose adequately the nature and purpose for which it sought to have those persons coming to it for income tax preparation services authorize the preparer to use information supplied in connection with preparations for other purposes.

14. F.T.C. REQUIREMENT THAT TAX PREPARER, IN SEEKING AUTHORIZATION TO USE TAX INFORMATION FOR OTHER PURPOSES, USES PRESCRIBED DISCLOSURE FORM AND ADVISES CUSTOMERS OF EXACT TAX INFORMATION TO BE USED; THE MANNER IN WHICH IT WILL BE USED; AND THE PERSONS WHO WILL HAVE ACCESS TO THE INFORMATION IS VALID.

Federal Trade Commission requirement that income tax preparer, which also engaged in making of personal loans, inform any person who came to it for preparation services and which it asked to authorize use of information for other purposes of the specific purpose for which the consent was being signed, the exact information which would be used, the particular use which would be made of the information, and the parties to whom the information be made available was valid; FTC was also authorized to require that the tax preparer use a form which contained the customer's name, the preparer's name, the date on which the consent was signed, and a statement that the tax return information could only be used for stated purposes.

(Syllabus, with substituted captions, taken from 542 F.2d 611)

On petition for review, court held that evidence supported Commission's determination that "Instant Tax Refund" advertisements were misleading because they failed to adequately disclose that prospective borrowers, entitled to income tax refunds, were still required to meet regular credit worthiness standards; that order prohibiting the use of the phrase "Instant Tax Refund" was too broad; and that tax preparation customers were not properly informed of other purposes for which tax preparation information would be utilized.

Petition for review granted in part and denied in part and enforcement granted in part.

E. Norman Veasey, R. Franklin Balotti, Richards, Layton & Finger, Wilmington, Del., for petitioners.

Robert J. Lewis, Gen. Counsel, *Gerald P. Norton,* Deputy Gen. Counsel, *Gerald Harwood,* Asst. Gen. Counsel, *William A. E. Doying,* Atty., Washington, D.C., for the Federal Trade Commission.

Before VAN DUSEN, GIBBONS and ROSENN, *Circuit Judges.*

We here consider a petition for review of a final order of the Federal Trade Commission, filed pursuant to 15 U.S.C. § 45(c). The order directed the petitioner Beneficial Corporation to cease and desist from

certain practices in connection with its loan and tax preparation business.[1] Beneficial challenges both the Commission's violation determinations and the breadth of its remedy. We enforce the Commission's order in part, but vacate and remand in part because we conclude that the order is overbroad in one respect.

I. THE COMMISSION PROCEEDINGS

On April 10, 1973, the Federal Trade Commission filed a complaint charging Beneficial with unfair and deceptive trade practices in connection with the preparation of income tax returns and the making of consumer loans in the loan offices of the Beneficial Finance System, in violation of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Beneficial, through 1400 branches operated by wholly-owned subsidiaries comprising the Beneficial Finance System, engaged in the business of making loans to members of the public based on their credit-worthiness. In the spring of 1969 Beneficial decided to go into the business of income tax return preparation. Because of developments in computer technology, Beneficial's loan officers were able to gather the information necessary for a computer to prepare tax returns accurately and at reasonable cost. The decision to enter the tax return preparation business was based on the belief that customers for the service who needed funds to pay the tax found to be due would find it convenient to borrow such funds from Beneficial. It soon became apparent, however, that most such customers would actually receive tax refunds. Beneficial decided to advertise a loan providing for an immediate use of money in anticipation of the tax refund, thus eliminating the wait for a refund check from the government. The Commission and Beneficial agreed that the tax refund loan is nothing other than Beneficial's usual loan service, based on the credit-worthiness of the borrower as to which the **[614]** anticipated tax refund may have no bearing. The parties differed on (1) whether the advertising of the loan deceived customers as to its nature, and (2) whether Beneficial improperly used the tax information it obtained in its tax return preparation service to solicit customers for loans. After an evidentiary hearing an administrative law judge on October 21, 1974, found Beneficial to be in violation in both respects. The Commission affirmed this decision on July 15, 1975, and entered a cease and desist order which, among other things, prohibited Beneficial from using in its copyrighted advertising the term " 'instant tax refund,' or any other word or words of similar import or meaning," and from

[1] The petitioners are Beneficial Corporation and Beneficial Management Corporation, both of which are corporations incorporated under the laws of Delaware with their principal places of business in Delaware and New Jersey, respectively. The loan offices in the Beneficial Finance System are operated by subsidiaries of Beneficial Corporation. Both of the petitioners will be referred to collectively as "Beneficial".

using customer tax information in loan solicitations except under prescribed conditions.

The evidence before the administrative law judge established that Beneficial's 1969 and early 1970 advertising typically used a text such as the following:

> Do you have a refund coming to you on your income taxes this year? Well, there's no need to wait weeks for your refund check. Get the money right now—even before you mail your return—with a cash advance from Beneficial. We call it the Instant Tax Refund, a special service of Beneficial Finance Instant Tax Refund. At Beneficial you're good for more * * *.

By February 1970 Beneficial added a reference to a loan, and to the fact that the customer would have to qualify for that loan. There were additional modifications and qualifications with the result that Beneficial's radio and television advertisements at the time of the Commission's order typically were like the following:

> ANNCR: This year, have your taxes prepared a better way * * *
> SINGERS: At Beneficial (toot, toot) * * *
> ANNCR: at Beneficial Finance. Beneficial's Income Tax Service does your taxes by computer * * * for as little as five dollars. And listen to Beneficial's "Instant Tax Refund" Plan: if you have a refund coming, you don't have to wait weeks for a Government check. The instant you qualify for a loan, Beneficial will lend you the equivalent of your refund, in cash, instantly. It's the "Instant Tax Refund" Plan * * * at Beneficial Finance. The place to have your taxes done this year.

The Commission concluded that both the original advertising and the modified copy were false and misleading, and that the proper remedy was a total prohibition against the use of the copyrighted terms "Instant Tax Refund Plan" or "Instant Tax Refund Loan", no matter how qualified by the preceding or following text.

The evidence before the administrative law judge also established that from late 1969, when it started its tax return preparation business, until December 1971, Beneficial routinely used information obtained from its tax return customers for the purposes of soliciting loans. Indeed, the generation of loan business was the principal motivation underlying the decision to expand into the tax return preparation business. On December 10, 1971, § 316 of the Revenue Act of 1971, 26 U.S.C. § 7216, was enacted, effective January 1, 1972. Subject to exceptions not material here, § 7216(a) provides

> *General Rule.*—Any person who is engaged in the business of preparing, or providing services in connection with the preparation of returns of the tax imposed by chapter 1, or declarations or amended declarations of estimated tax under section 6015, or any person who for compensation prepares any such return or declaration for any other person, and who—
>
> (1) discloses any information furnished to him for, or in connection with, the preparation of any such return or declaration, or

(2) uses any such information for any purpose other than to prepare, or assist in preparing, any such return or declaration,

shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined [615] not more than $1,000 or imprisoned not more than 1 year, or both, together with the costs of prosecution.

This statute establishes a general prohibition against the disclosure or use for nontax purposes of tax information gathered by a tax preparer like Beneficial. Treasury regulations adopted in 1974 under the authority of § 7216(b)(3), however, permit[2] the use of such information with the customer's written consent.[3] The new law compelled Beneficial to alter its solicitation practices. In attempting to comply with the requirements, Beneficial adopted a Form BOR–56, reproduced in the margin in its entirety[4] and required that its loan offi[616]cers

[2] (a) Written consent to use or disclosure—

(1) Solicitation of other business. (i) If a tax return preparer has obtained from the taxpayer a consent described in paragraph (b) of this section, he may use the tax return information of such taxpayer to solicit from the taxpayer any additional current business, in matters not related to the Internal Revenue Service, which the tax return preparer provides and offers to the public. The request for such consent may not be made later than the time the taxpayer receives his completed tax return from the tax return preparer. If the request is not granted, no follow up request may be made. This authorization to use the tax return information of the taxpayer does not apply, however, for purposes of facilitating the solicitation of the taxpayer's use of any services or facilities furnished by a person other than the tax return preparer, unless such other person and the tax return preparer are members of the same affiliated group within the meaning of section 1504. Thus, for example, the authorization would not apply if the other person is a corporation which is not affiliated with the tax return preparer within the meaning of section 1504(a). Moreover, this authorization does not apply for purposes of facilitating the solicitation of additional business to be furnished at some indefinite time in the future, as, for example, the future sale of mutual fund shares or life insurance, or the furnishing of future credit card services. It is not necessary, however, that the additional business be furnished in the same locality in which the tax return information is furnished.

Treas.Reg. § 301.7216–3(a) (1974).

[3] The form of consent is specified and illustrated in Treas.Reg. § 301.7216–3(b)–(c) (1974):

(b) Form of consent. A separate written consent, signed by the taxpayer or his duly authorized agent or fiduciary, must be obtained for each separate use or disclosure authorized in paragraph (a)(1), (2) or (3) of this section and shall contain—

(1) The name of the tax return preparer,

(2) The name of the taxpayer,

(3) The purpose for which the consent is being furnished,

(4) The dates on which such consent is signed,

(5) A statement that the tax return information may not be disclosed or used by the tax return preparer for any purpose (not otherwise permitted under § 301.7216–2) other than that stated in the consent, and

(6) A statement by the taxpayer, or his agent or fiduciary, that he consents to the disclosure or use of such information for the purpose described in subparagraph (3) of this paragraph.

(c) Illustrations. The application of this section may be illustrated by the following examples:

Example (1). In order to stimulate the making of loans, a bank advertises that it is in the business of preparing tax returns. A taxpayer goes to the bank to have his tax return prepared. After the return has been completed by the bank, the employee of the bank who obtained the tax return information from the taxpayer explains that the taxpayer owes an additional $400 in taxes and that the bank's loan department may be able to offer the taxpayer a loan to pay the tax due. If the taxpayer decides to accept the opportunity offered to apply for a loan, the bank must first have the taxpayer execute a written consent described in paragraph (b) of this section for the bank to use any of such information which is required in determining whether to make the tax loan.

[4] AUTHORIZATION

To

I hereby authorize and request you to use my name and address for the purpose of soliciting me in connection with any business in which you or your associated companies or affiliated corporations may engage. Furthermore, I acknowledge that this and any other information which may appear in any loan or finance application by me or on my behalf or in any loan or finance statement or information form, given in connection therewith, was not given to you for the purpose of preparing any tax return on my behalf.

Dated:

(Continued)

first procure a tax return customer's signature on that form before soliciting the customer for a loan. The Commission held that the pre–1972 use of tax information for loan solicitations was an unfair and deceptive trade practice amounting to an abuse of a confidential relationship, in violation of § 5. It also held that Form BOR–56 was inadequate as an informed consent. Without deciding whether Beneficial's present practices violated the Revenue Act of 1971, the Commission held that those practices continued to violate § 5 and entered an order prohibiting Beneficial from:

7. Using information concerning any customers of respondents, including the name and/or address of the customer, for any purpose which is not essential or necessary to the preparation of a tax return if such information was obtained by respondents as a result of the preparation of the customer's tax return which includes any information given by the customer after he has indicated, in any way, that he is interested in utilizing respondents' tax preparation services, unless prior to obtaining such information respondents have both (1) specifically requested from the customer the right to use the tax return information of the customer and (2) have executed a separate written consent signed by the customer which shall contain:

1. Respondent's name;
2. The name of the customer;
3. The specific purpose for which the consent is being signed;
4. The exact information which will be used;
5. The particular use which will be made of such information;
6. The parties or entities to whom the information will be made available;
7. The date on which such consent is signed;
8. A statement that the tax return information may not be used by the tax return preparer for any purpose other than that stated in the consent, and
9. A statement by the taxpayer that he consents to the use of such information for the specific purpose described in subparagraph (3) of this paragraph;

Provided, however, that nothing herein shall prohibit respondents from using names and addresses only of customers for the purpose of communication with such customers solely concerning respondents' income tax preparation business.

Nothing in the above provision is intended to relieve respondents of any further requirements imposed on them by the Revenue Act of 1971, Pub.L. 92–178, title III, § 316(a), December 10, 1971; 26 U.S.C. § 7216 or regulations issued pursuant to it.

The instant petition for review followed the Commission's decision and order.

II. DECEPTIVE ADVERTISING

A.

[1,2] At the outset, Beneficial contends that the Commission's finding that its "Instant Tax Refund" advertising campaigns were

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Signature
Name (Print)
Address
City State Zip

deceptive lacks evidentiary support, and that in the absence of such a finding, supported by record evidence, no order could properly have been entered respecting its advertising. Section 5(c) of the Act, 15 U.S.C. § 45(c), provides that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive" upon review in the Court of Appeals. The law is clear that properly interpreted, the statute requires review by the substantial evidence in the record as a whole standard.[5] **[617]** The parties agree that the tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context.[6] An intent to deceive is not an element of a deceptive advertising charge under § 5.[7] Moreover, the FTC has been sustained in finding that advertising is misleading even absent evidence of that actual effect on customers; the likelihood or propensity of deception is the criterion by which advertising is measured.[8] Whether particular advertising has a tendency to deceive or mislead is obviously an impressionistic determination more closely akin to a finding of fact than to a conclusion of law. *Cf. FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, 80 S.Ct. 155 (1965). At the same time, evidence that some customers actually misunderstood the thrust of the message is significant support for the finding of a tendency to mislead.

[3, 4] The initial advertising quoted above (1969–early 1970) did not indicate, at least in words, that the offered "advance" was actually a loan, that the customer would have to meet regular standards of credit-worthiness, or that if the customer had a satisfactory credit rating he could obtain a Beneficial loan even though he was not a tax return preparation customer. Beneficial's own advertising agency reported that the initial campaign resulted in fairly widespread public confusion as to the nature of the "refund" being offered. The Commission concluded:

> The early Instant Tax Refund advertising is, on its face, totally misleading about the true nature of Beneficial's offer. Instead of making clear that Beneficial is simply offering its everyday loan service, the advertising implies that Beneficial will give a special cash advance to income tax preparation customers with a government refund due, in the amount of their refund. The natural impression, since the Instant Tax Refund

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[5] *See, e.g., Adolph Coors Co.* v. *FTC*, 497 F.2d 1178, 1184 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105, 95 S.Ct. 775, 42 L.Ed2d 801 (1975); *American Cyanamid Co.* v. *FTC*, 363 F.2d 757, 772 (6th Cir. 1966); *Continental Wax Corp.* v. *FTC*, 330 F.2d 475, 477 (2d Cir. 1964); *Regina Corp.* v. *FTC*, 322 F.2d 765, 768 (3d Cir. 1963); *Snap-On Tools Corp.* v. *FTC*, 321 F.2d 825, 835 (7th Cir. 1963); *Carter Products, Inc.* v. *FTC*, 268 F.2d 461, 493 (9th Cir.), *cert. denied*, 361 U.S. 884, 80 S.Ct. 155, 4 L.Ed.2d 120 (1959). *See also FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 386 n. 14, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1968) (citing *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951)).

[6] *See e.g., FTC* v. *Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963); *Aronberg* v. *FTC*, 132 F.2d 165, 167 (7th Cir. 1943).

[7] *Regina Corp.* v. *FTC*, 322 F.2d 765, 768 (3d Cir. 1963).

[8] *Bankers Security Corp.* v. *FTC*, 297 F.2d 403, 405 (3d Cir. 1961); *Resort Car Rental Sys.* v. *FTC*, 518 F.2d 962, 964 (9th Cir. 1974) (per curiam); *Montgomery Ward & Co.* v. *FTC*, 379 F.2d 666 (7th Cir. 1967); *Feil* v. *FTC*, 285 F.2d 879, 896 (9th Cir. 1960).

is stressed as exclusive and special is that this cash advance is different from a normal consumer loan.

This finding is supported by substantial evidence. While not conceding the validity of the Commission's finding with respect to the initial advertising, Beneficial does not seriously dispute that we must accept it. It contends, however, that because the early text was soon abandoned with no prompting from the Commission, the finding cannot support a cease and desist order. But this and other courts have held that at least where a discontinued deceptive trade practice could be resumed, the prior practice may be the subject of a cease and desist order.[9] Here the Commission's complaint was not filed until three years after the early advertising was discontinued, and there is no evidence from which the Commission could infer that it would in the early form be repeated. Beneficial urges that the entry of a cease and desist order in such circumstances, based solely on the early violations, would amount to an abuse of discretion.[10]

[618] [5] We need not decide that issue in this case, however, for we conclude that the Commission's finding that even the later advertising had a tendency to deceive or mislead has a sufficient evidentiary support in the record as a whole. The testimony of some consumers, credited by the Commission, was that during the later period they failed to understand that Beneficial was offering only its normal loan service with normal finance charges. Their impression was that the main qualification for the Instant Tax Refund loan was entitlement to an actual government refund. These consumers may well have been singularly dense.[11] They were, nevertheless, a part of the audience to which the advertisements were directed. We cannot second guess the Commission's finding respecting the later advertising. *FTC* v. *Colgate-Palmolive Co., supra; Fedders Corp.* v. *FTC*, 529 F.2d 1398, 1403 (2d Cir. 1976), *petition for cert. filed*, 44 U.S.L.W. 3652 (U.S.Apr. 19, 1976). Thus whether or not the Commission could have acted solely on the basis of the earlier advertising, it certainly did not abuse its discretion

[9] *Hershey Chocolate Corp.* v. *FTC*, 121 F.2d 968, 971–72 (3d Cir. 1941); *P. F. Collier & Son Corp.* v. *FTC*, 427 F.2d 261, 271–72 (6th Cir.), *cert. denied*, 400 U.S. 926, 91 S.Ct. 188, 27 L.Ed.2d 186 (1970); *Feil* v. *FTC*, 285 F.2d 879, 886 n.15 (9th Cir. 1960).

[10] See *Rodale Press, Inc.* v. *FTC*, 132 U.S.App. D.C. 317, 407 F.2d 1252 (D.C. Cir. 1968); *FTC* v. *Civil Service Training Bureau*, 79 F.2d 113 (6th Cir. 1935); *John C. Winston Co.* v. *FTC*, 3 F.2d 961 (3d Cir.), *cert denied*, 269 U.S. 555, 46 S.Ct. 19, 70 L.Ed. 409 (1925). *But see C. Howard Hunt Pen Co.* v. *FTC*, 197 F.2d 273, 281 (3d Cir. 1952).

[11] "The general public has been defined as 'that vast multitude which includes the ignorant, and unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions.' The average purchaser has been variously characterized as not 'straight thinking,' subject to 'impressions,' uneducated, and grossly misinformed; he is influenced by prejudice and superstition; and he wishfully believes in miracles, allegedly the result of progress in science * * *. The language of the ordinary purchaser is casual and unaffected. He is not an 'expert in grammatical construction' or an 'educated analytical reader' and, therefore, he does not normally subject every word in the advertisement to careful study."
1 Callman, Unfair Competition and Trademarks § 19.2(a)(1), at 341–44 (1950) quoted in *FTC* v. *Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963).

in concluding that some remedy was still appropriate since the confusion persisted.

B.

[6–8] Both the administrative law judge and the Commission concluded that the *only* appropriate remedy for the violation found was a total ban on the use of the Instant Tax Refund phrase or any words of similar import. Beneficial contends that explanatory words could cure any tendency to mislead, and that an order forcing it to abandon entirely its copyrighted and heavily promoted phrase is unwarranted. The Commission reasoned:

> No brief language is equal to the task of explaining the Instant Tax Refund slogan, for the phrase is inherently contradictory to the truth of Beneficial's offer. In truth, the Instant Tax Refund is not a refund at all, but only Beneficial's everyday loan service * * *; nor is it in the least related to any tax refunds, for the size of the loan Beneficial wishes to sell is geared to the customer's credit limit instead of his government refund and many people due a government refund do not qualify for an Instant Tax Refund loan at all * * *.

We do not believe that the Commission's conclusion as to the capacity of qualifying language to apprise Beneficial's audience of the true nature of the offered service can be sustained. We acknowledge, of course, that we are ordinarily obliged to defer broadly to the Commission's exercise of informed discretion in framing remedial orders that bear some rational relationship to the removal or prevention of an established violation. *See FTC* v. *National Lead Co.*, 352 U.S. 429, 77 S.Ct. 502, 1 L.Ed.2d 438 (1957); *FTC* v. *Colgate-Palmolive Co., supra; Windsor Distributing Co.*, v. *FTC*, 437 F.2d 443, 444 (3d Cir. 1971) (per curiam); *Consumer Products of America, Inc.* v. *FTC*, 400 F.2d 930, 933 (3d Cir. 1968). But we are dealing in this case with the government regulation of a form of speech. The first amendment requires, we believe, an **[619]** examination of the Commission's action that is more searching than in other contexts.

[9, 10] It is now established beyond dispute that there is no commercial speech exception to the first amendment. *See Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975); *see also Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). That does not mean that an advertiser may engage in speech that is an essential part of a scheme to violate an otherwise valid law. *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376, 388, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973). It does mean that the remedy for the perceived violation can go no further in

imposing a prior restraint on protected commercial speech than is reasonably necessary to accomplish the remedial objective of preventing the violation. *See, e.g., United States* v. *O'Brien*, 391 U.S. 367, 382, 88 S.Ct. 1673, 20 L.Ed.2d 692 (1968); *New Jersey State Lottery Commission* v. *United States*, 491 F.2d 219 (3d Cir. 1974) (en banc), *vacated as moot*, 417 U.S. 907, 94 S.Ct. 2603, 41 L.Ed.2d 211 (1975); *Veterans & Reservists For Peace in Vietnam* v. *Regional Commissioner of Customs*, 459 F.2d 676 (3d Cir.), *cert. denied*, 409 U.S. 933, 93 S.Ct. 232, 34 L.Ed.2d 188 (1972); *Linmark Associates, Inc.* v. *Township of Willingboro*, 535 F.2d 786, at 813–814 (3d Cir. 1976) (Gibbons, J., dissenting).

Even before the demise of *Valentine* v. *Chrestensen*, 316 U.S. 52, 62, S.Ct. 920, 86 L.Ed. 1262 (1942), was heralded in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc., supra*, and *Bigelow* v. *Virginia, supra*, the Supreme Court held that the Federal Trade Commission abused its discretion in ordering the excision from advertising of a valuable business asset like a trade name without considering whether modification of the message could eliminate the objectionable portion. *Jacob Siegal Co.* v. *FTC*, 327 U.S. 608, 66 S.Ct. 758, 90 L.Ed. 888 (1946); *FTC* v. *Royal Milling Co.*, 288 U.S. 212, 53 S.Ct. 335, 77 L.Ed. 706 (1933). The Second Circuit has said that where qualifying explanatory language does not inherently contradict the advertiser's identifying language it should be accepted in preference to requiring excision. *Elliott Knitwear, Inc.* v. *FTC*, 266 F.2d 787, 790 (2d Cir. 1959). The Commission attempts to distinguish these authorities on the ground that no combination of words in which "instant" and "refund" appear in a proximate relationship can avoid conveying the impression that Beneficial is offering an instant tax refund from the government rather than an instant loan. We do not believe that the following examples convey that impermissible impression:

> Beneficial's everyday loan service can provide to regularly qualified borrowers an Instant Tax Refund Anticipation Loan whether or not the borrower uses our tax service.
>
> or
>
> Beneficial's everyday loan service can provide to any regularly qualified borrower an instant loan in anticipation of his tax refund. We call it an Instant Tax Refund Anticipation Loan.

In failing to consider fully the feasibility of requiring merely that advertising copy be rewritten in lieu of total excision of the offending language, the Commission would appear to have exceeded its remedial authority under § 5 as shaped by the *Jacob Siegel-Royal Milling* line of cases. The Commission's opinion dealt with the *Royal Milling* case in a footnote:

Though we believe the *Royal Milling* line of cases in compatible with our normal responsibility to enter effective but not overbroad orders, to the extent it may actually be a limitation or exception to the Commission's authority to devise fully effective remedies, then we decline to expand the exception from trade names to advertising slogans.

[620] We reject the limiting construction that the Commission attaches to *Royal Milling*. This conclusion is based in part upon the difficulty we have in accepting the Commission's differentiation between trade names and copyrighted advertising material—a distinction without a difference in the spirit of *Royal Milling*. The conclusion is reached not unmindful of the long shadow cast by the first amendment, however, for doubtless the Commission's broad construction of its § 5 remedial authority cannot survive the demise of the commercial speech exception to the first amendment. While *Royal Milling* in terms merely describes a statutory limitation upon the Commission's remedial power in a particular class of cases, the rule it announced has subsequently evolved into a general statement of constitutional principle.

[11] The Commission, like any governmental agency, must start from the premise that any prior restraint is suspect, and that a remedy, even for deceptive advertising, can go no further than is necessary for the elimination of the deception. The Commission's order proscribing use of the term instant tax refund or any other word or words of similar import or meaning, without consideration of the context in which the words appear, went further than was permitted for that purpose and was an abuse of the Commission's remedial discretion. It cannot in that form and without such consideration be affirmed or enforced.

III. THE TAX INFORMATION USE VIOLATION

In its complaint the Commission charged that the retention and use of the customer tax information violated § 5 in two respects. First, it charged that the special relationship between a tax return preparer and a customer had the capacity and tendency to mislead the customer into the erroneous and mistaken belief that the information provided would be used solely for the preparation of the tax return and would remain confidential. Thus the failure to disclose anticipated use in loan solicitation was said to be a false, misleading and deceptive practice injuring the customers. Secondly, the Commission charged that because Beneficial had competitors in the tax return preparation business, from whom business could be diverted, the failure to disclose anticipated use of the tax information in loan solicitations was an unfair method of competition.

[12] Beneficial does not contend that the use of the tax information

in loan solicitation, absent § 316 of the Revenue Act of 1971, is a subject matter beyond the reach of the Commission's § 5 authority. Rather, it contends that the latter statute and the Treasury Regulations issued thereunder preempt the field, that it is now in full compliance with those regulations, and that the Commission's order requiring more is invalid. While admitting that § 5 originally gave the Commission authority to find unfair trade practices in relation to tax preparation services, Beneficial argues that § 316 was intended by Congress to circumscribe that power. Nothing on the face of § 316 supports that construction, and we have been referred to no legislative history which would tend to suggest such an intention.[12] The criminal prohibition in § 316 appears to be directed at preserving the confidentiality of tax return information except under specified circumstances. Enforcement under § 5 of the Federal Trade Commission Act, in contrast, is aimed at preventing unfair and deceptive acts and practices. There is nothing inconsistent between the two policies, and there is no reason for attributing to Congress the intention of reducing the Commission's power to prevent deception or unfairness. If the Commission had directed conduct which is inconsistent with the confidentiality policy of § 316, we could understand Beneficial's objection. But in this case the Commission is pursuing a separate governmental objective in a manner wholly consistent with that policy. **[621]** That the Commission's order goes beyond the requirements of Treasury Regulation 301.7216–3 in several insignificant respects seems to us unexceptionable. Nor does Beneficial's contention[13] that the Internal Revenue Service has approved its Form BOR–56 change our view. Assuming such approval, nothing in the Revenue Act of 1971 or any other statute confers on the Internal Revenue Service authority to determine what is an appropriate remedy for a violation of § 5 of the Federal Trade Commission Act.

[13, 14] The Commission's finding that Beneficial's practices, both prior to the enactment of § 316 and thereafter, were misleading because of the failure of Form BOR–56 to adequately disclose the nature and purpose of the waiver of confidentiality is supported by substantial evidence in the record as a whole. The remedial order, which permits Beneficial to solicit tax return customers for loan business, only requires the observance of certain procedural formalities. Items (1), (2), (3), (7), (8) and (9) duplicate the six requirements of the Treasury Regulation. The additional items required to be disclosed are:

4. The exact information which will be used.

[12] The House, Senate and House Conference Reports on the Revenue Act of 1971 are reproduced in 1971 U.S.Code Cong. & Admin.News pp. 1825–2079. There does not appear to be any discussion of § 316 in any of these reports.

[13] That contention is disputed by the Commission as unsupported by the evidence. We need not resolve the dispute.

5. The particular use which will be made of such information.
6. The parties or entities to whom the information will be made available.

These additional requirements are rationally related to the unfair practices which the Commission found. We cannot in these circumstances hold that the Commission abused its discretion in fashioning the remedy it did.

IV. CONCLUSION

The petition for review will be granted insofar as the Commission's order requires total excision of the words "Instant Tax Refunds" from all Beneficial advertising. That part of the order will be set aside and the case remanded to the Commission for further proceedings consistent with Part IIB of this opinion. In all other respects the petition for review will be denied. To the extent that the petition has been denied, the order of the Commission is affirmed and the petitioners are commanded to obey it.

VAN DUSEN, *Circuit Judge*, dissenting and concurring in part:

I respectfully dissent from part II-B of the majority opinion,[1] which states that the Commission did not consider whether modification of the message advertised could eliminate the objectionable, deceptive portion of such message. The majority opinion overlooks this language of the Commission's opinion (part II-C):

> The law judge's order bans the use of the Instant Tax Refund phrase or similar words. He found no qualifying language could remedy the deception and that only purging Beneficial's advertisements of the phrase would suffice. Beneficial vigorously contends that explanatory language could cure any fault and that [622] forced abandonment of its copyrighted and heavily promoted phrase is unwarranted.
>
> In some instances, it is true, respondents have been allowed to retain trade names which had become valuable business assets, because the misleading qualities of the names could be dispelled by explanation. * * * If explanatory language is insufficient to qualify a deceptive trade name or is inherently contradictory, its effect is simply to confuse the public and the Commission in framing a proper remedy must excise the offending phrase altogether. [Citations omitted.] Moreover, the Commission has wide

[1] The majority apparently does not challenge the following findings of the Commission, which are supported by substantial evidence on the whole record (1193a):

"In truth, it is admitted, what Beneficial is offering is its everyday loan service. The Instant Tax Refund is not a refund at all but a personal consumer loan, with regular finance charges, costs, and repayment period. . . . Such a loan is always available to anyone meeting Beneficial's credit standards, whether or not the customer is owed a tax refund by the government, but Beneficial will not make any loan to a person failing to meet its credit standards, even if the customer is due a government refund. The size of the loan Beneficial wishes to sell is not related to any tax refund, but to the customer's credit limit." [References to record omitted.] The testimony of more than five consumers, credited by the Commission, was that they were misled during the later period and "failed to understand that Beneficial was offering only its normal loan service with normal finance charges" (majority opinion at 618). As stated by the majority, "[t]heir impression was that the main qualification for the Instant Tax Refund loan was entitlement to an actual government refund."

latitude in judgment, particularly in determining whether qualifying words will eliminate a deceptive trade name. * * *
In light of these principles, we see no reason for allowing Beneficial to retain the offending slogan. The Instant Tax Refund advertisements, we have held, have the capacity and tendency to mislead and have in fact misled consumers. In fact, since its inception in 1969, the Instant Tax Refund phrase has deceived continuously, and Beneficial's repeated efforts to explain it have not cured the false impression it leaves. Beneficial's inability to remedy the deception, which persists even in the qualifying phrase it offers on this appeal as a settlement, confirms what we believe to be obvious. No brief language is equal to the task of explaining the Instant Tax Refund slogan, for the phrase is inherently contradictory to the truth of Beneficial's offer. In truth, the Instant Tax Refund is not a refund at all, but only Beneficial's everyday loan service, complete with normal finance charges and credit checks; nor is it in the least related to any tax refunds, for the size of the loan Beneficial wishes to sell is geared to the customer's credit limit instead of his government refund and many people due a government refund do not qualify for an Instant Tax Refund loan at all; moreover, depending on the season of the year or the customer's sales resistance, the Instant Tax Refund may be called a Vacation loan, a Taxpayer loan, or a Bill Consolidation loan.

* * * * * * *

Beneficial argues that excision of the Instant Tax Refund slogan and words of similar import would prevent any reference to the concept of tax refund loans. This is quite true. The record is absolutely clear that, in Beneficial's business at least, no such concept exists. If, however, Beneficial should begin offering a special loan service actually related in some way to income tax refunds, it may seek to reopen the order. For now we believe the absolute prohibition necessary.

[Footnotes omitted.] (1198a–1290a)

I do not believe that the advertisements suggested at page 619 of the majority opinion would make it clear to these consumers that the loan being offered is an everyday consumer loan having no relationship to tax refunds and no special features. Furthermore, on this record I believe the Commission was entitled to conclude that the words "tax refund loan" inherently contradict the idea of an everyday loan unrelated to refunds. The words "tax refund" imply something free and "unique" and the word "Anticipation" in the court-suggested advertisements might only underline the non-existent relationship between the loan and any refund. It is noted that the Commission gave Beneficial the right to reopen its order if a relationship between tax refunds and the loans was shown to exist in future advertisements (see above, this page).

Given the Commission's consideration of the possibility of a lesser remedy, its broad discretion, and Beneficial's inability to produce an advertisement which was not misleading, I believe the excision order should be sustained. See *Baker's Franchise Corp.* v. *FTC*, 302 F.2d 258, 262 (3d Cir. 1962), where this court said: "The matter of the choice of remedy is one for the Commission." See also cases cited at the top of page 618 of the majority opinion. At the **[623]** least, I believe the

Commission in the first instance should be permitted to consider any new advertisements using the Instant Tax Refund language before they are used.

I would affirm the conclusion reached in part II-C of the Commission's opinion in view of these legal principles adopted by the Supreme Court of the United States:

A. THE COMMISSION MAY PROHIBIT STATEMENTS WHICH, THOUGH LITERALLY TRUE, ARE POTENTIALLY DECEPTIVE.

Although it is now clear that commercial speech enjoys "some" First Amendment protection, the Supreme Court has been careful to state that "regulatory commissions may prohibit businessmen from making statements which, though literally true, are potentially deceptive." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 2451, 48 L.Ed.2d 310, and n. 31 (1976); see *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 and n. 24 (1976), where the Court said: "The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely."

In *Young* v. *American Mini Theatres, Inc., supra* at ——, 96 S.Ct. at 2451 n. 31, the Court stated: "The power of the Federal Trade Commission to restrain misleading, as well as false, statements in labels and advertisements has long been recognized [citing cases]."

B. THE FEDERAL COURTS ARE LIMITED IN THEIR RIGHT TO REVIEW THE EXERCISE BY AN ADMINISTRATIVE AGENCY OF ITS DISCRETION.

In *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 66 S.Ct. 758, 90 L.Ed. 888 (1946), the Court repeatedly emphasized the "limited" scope of our review of Commission discretion. In *Seigel*, the record did not indicate whether a remedy short of excision had been considered or would be adequate. The Court declined to hold that excision was inappropriate and simply remanded for consideration of a more limited remedy. See also *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 54 S.Ct. 315, 78 L.Ed. 655 (1934) (upholding an excision order).

Here the Commission has considered and rejected a more limited remedy, and the *Siegel* case states at page 613, 66 S.Ct. at page 760, that: "The courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found."

Applying the standard enunciated in *Jacob Siegel*, which appears to survive the demise of the former commercial speech doctrine, I believe

the choice of the remedy of total excision was permissible on this record.

In all other respects, I concur in the majority opinion.

ASHLAND OIL, INC. v. FEDERAL TRADE COMMISSION et al.*

Nos. 76-1174, 76-1304. F.T.C. File No. 99-268.

(United States Court of Appeals, District of Columbia Circuit, September 20, 1976)

1. ABSENT SHOWING THAT PUBLIC DISCLOSURE WOULD NECESSARILY FOLLOW, F.T.C. IS NOT STATUTORILY PRECLUDED FROM SUBMITTING "TRADE SECRETS" TO CONGRESSIONAL SUBCOMMITTEE.

[978] Although oil company's reserve estimates for natural gas leases and contracts on federal lands constituted a "trade secret" of great competitive value, the Federal Trade Commission, which obtained information pursuant to special report order, would not be enjoined from making it available to a House subcommittee investigating current natural gas shortage, absent any substantial showing that such material would necessarily be made public if turned over to Congress; absent such showing, statute providing that FTC may make public any information, except trade secrets, which it has obtained does not preclude the FTC from transmitting trade secrets to Congress pursuant to either subpoena or formal request.

2. THE SAME POSITION NEED NOT BE ADOPTED BY ALL GOVERNMENT AGENCIES IN MATTERS UNDER LITIGATION.

There is no requirement that all agencies of the government adopt the same position with regard to matters under litigation.

3. RATHER THAN ACCEPT COUNSEL'S POST HOC RATIONALIZATIONS, COURT MUST REVIEW DISCRETIONARY ACTIONS IN TERMS OF THE RATIONALE IN WHICH THE AGENCY ACTED.

Any statements by government counsel attempting to disavow basis on which administrative agency acted may not bind the court to ignore the rationale on which agency decisions was actually based; the court must review discretionary actions in terms of the rationale in which the agency acted, rather than accept counsel's post hoc rationalizations.

4. COURT'S OPINION THAT AGENCY LACKED EXPERTISE DID NOT GIVE IT LICENSE TO REVERSE AGENCY'S ACTION, IGNORING GROUND ON WHICH AGENCY RELIED.

Where no special agency expertise is involved a court may affirm agency action on a ground in addition to those relied on by the agency; however, the court's view that the agency is lacking in expertise does not license it to reverse while ignoring the grounds on which agency relied.

5. BECAUSE OF AGENCY'S EXPERTISE, NOT THAT OF APPELLATE COUNSEL, ADMINISTRATIVE INTERPRETATION OF REGULATORY STATUTE IS ACCORDED GREAT WEIGHT BY COURTS.

Administrative interpretation of a regulatory statute, which interpretation is to be accorded great weight by the courts, depends on the expertise of the agency and not that of appellate counsel.

6. JUSTICE DEPARTMENT WAS NOT AUTHORIZED TO PRESS ISSUE OF

* Reported in 548 F.2d 977 (1976); *rehearing denied*, March 22, 1977.

WHETHER F.T.C. WAS REQUIRED TO COMPLY WITH CONGRESSIONAL INFORMATION REQUESTS UNDER STATUTE GRANTING IT AUTHORITY.

Statute granting Department of Justice authority to conduct litigation does not grant the Department general power to challenge in-court decisions of other government agencies; hence, in proceedings involving issue whether Federal Trade Commission Act precluded the FTC from transmitting trade secrets to Congress pursuant either to subpoena or formal request the Department was not authorized to press issue of whether Act obligated the agency to comply with all congressional requests for information.

7. IN DETERMINING VALIDITY OF AGENCY ACTION, APPELLATE COUNSEL'S CONFESSION OF ERROR IS NOT BINDING.

Confession of error by appellate counsel is not binding in determining validity of agency action.

(Syllabus, with substituted captions, taken from 549 F.2d 977)

Upon appeal from decision of U.S. District Court, District of Columbia, 409 F.Supp. 297, court held that the Federal Trade Commission Act, which prohibits agency from making trade secrets public, did not preclude F.T.C. from transmitting such data to Congress pursuant to either subpoena or formal request, where there was no substantial showing that public disclosure would necessarily follow transmittal.

Affirmed.

Ray S. Bolze, Washington, D.C., with whom *Roger C. Simmons*, Washington, D.C., was on the brief for appellant in No. 76–1174 and appellee Ashland Oil, Inc., in No. 76–1304.

Joseph A. Califano, Jr., Washington, D.C., with whom *Richard M. Cooper* and *Benjamin W. Heineman, Jr.*, Washington, D.C., were on the brief for appellant in No. 76–1304 and appellee Moss in No. 76–1174.

Edwin E. Huddleson, III, Atty., Dept. of Justice, Washington, D.C., with whom *Rex E. Lee*, Asst. Atty. Gen., *Earl J. Silbert*, U.S. Atty., *Robert J. Lewis*, General Counsel, F.T.C., *Gerald P. Norton*, Deputy Gen. Counsel, *Gerald Harwood*, Asst. Gen. Counsel, *William A. E. Doying*, Atty., F.T.C., and *Leonard Schaitman*, Atty., Dept. of Justice, Washington, D.C., were on the brief for appellee, F.T.C., and others in No. 76–1174.

Before BAZELON, *Chief Judge*, MACKINNON and ROBB, *Circuit Judges*.

Dissenting opinion filed by *Circuit Judge* MACKINNON.

PER CURIAM:

[979] [1] This action was brought by Ashland Oil, Inc. to enjoin the Federal Trade Commission from transferring information obtained from Ashland to the House Subcommittee on Oversight and Investigation of the Committee on Interstate and Foreign Commerce. The Subcommittee Chairman, Rep. John E. Moss, intervened. The informa-

tion in question consists of Ashland's reserve estimates for all its natural gas leases and contracts on federal lands. All parties concede this information is a "trade secret" of great competitive value to Ashland. It is also of great interest to the Subcommittee for whatever light it may cast on the causes of the current natural gas shortage. *See generally, FTC* v. *Texaco,* 170 U.S.App.D.C. 323, 517 F.2d 137 (1975), *vacated and rehearing en banc ordered* (Feb. 6, 1976).

Judge Corcoran denied Ashland's request for preliminary and permanent injunctive relief in a comprehensive opinion. 409 F.Supp. 297 (1976). Ashland's central argument is that experience shows that if the information is made available to Congress, it will inevitably be "made public." This in turn is alleged to violate the prohibition in 15 U.S.C. § 46(f) against the FTC's "mak[ing] public" trade secrets.[1] Judge Corcoran rejected this argument on the grounds that "the courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties," 409 F.Supp. at 308. Concluding that Ashland's showing was insufficient to overcome this presumption, the court held that no likelihood of irreparable injury warranting an injunction had been established, *id.*, 309.

We affirm, essentially for the reasons stated in Judge Corcoran's opinion.

I

No substantial showing was made that the materials in the possession of the FTC will necessarily be "made public" if turned over to Congress. Therefore, we need not decide what application, if any, 15 U.S.C. § 46(f) might have if it were evident that Congress intended to "make public" trade secrets. At a minimum, we think it is clear that absent such a showing, 15 U.S.C. § 46(f) does not preclude the FTC from transmitting trade secrets to Congress pursuant either to subpoena or formal request.[2]

[1] The text of 15 U.S.C. § 46(f)(1970) is as follows:

The Commission shall also have power—

. . . . . .

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

[2] At argument, Ashland's counsel conceded that "the only question here is whether this [data] would be kept confidential by Mr. Moss's committee [sic]," May 10, 1976, Tr., 7, and that if it would, the subcommittee was "entitled" to the information. *Id.*

II

Unlike the dissent, we find it unnecessary to decide whether the subpoena issued for the data was valid under House Rules. The FTC's decision to turn over the materials in question was not based on—and in fact predated—issuance of the subpoena. On [980] October 29, 1975, Congressman Moss, in his capacity as Subcommittee Chairman, wrote to the FTC requesting all data gathered by the Commission relating to extensions of oil and gas leases on federal lands. J.A. 36–37. On November 18, 1975, Chairman Engman of the FTC responded that "[t]he Commission has determined to grant your request" and "* * * will deliver the information requested on November 28, 1975." J.A. 38–39. By telephone and confirming letter of November 18, the FTC notified Ashland that the agency planned to release the requested information to the Subcommittee. J.A. 40. Subsequently Ashland filed this action, and on November 24, Judge Corcoran issued a temporary restraining order precluding the turnover. J.A. 49–50. Only then, on December 2, 1975, did the Subcommittee issue its subpoena. J.A. 52–53.

It is clear that but for the temporary restraining order, the FTC would have submitted Ashland's data to the Subcommittee; indeed, on November 28, the FTC did deliver to the Subcommittee similar data from other companies, which had not challenged the release in court. J.A. 60. The dissent does not, and cannot deny that the FTC action challenged in this case was bottomed on a Congressional request for the data, not the subsequent subpoena. Nor does the dissent suggest that 15 U.S.C. § 46(f) must be read differently as a matter of law where a request, rather than a subpoena, is involved. The dissent's entire discussion of the subpoena rests solely on an interpretation of statements made by Government counsel during oral argument.[3] As

[3] The text of the exchange in question was as follows:

GOVERNMENT COUNSEL: Chief Judge Bazelon, may it please the court, the central issue in this case is whether Section 46(f) of the Federal Trade Commission Act gives the Commission any legal basis or any discretion to refuse to comply with a valid Congressional subpoena for trade secret information in the Commission's possession. Our position is two-fold: we submit there is no imminent threat of irreparable injury warranting an injunction and that on the merits neither Section 46(f) nor the Constitution prohibits the Commission from complying with a valid Congressional subpoena for trade secret information. I want to address the merits * * *.

JUDGE ROBB: Well, would it make any difference whether there was a subpoena or not, so long as the Subcommittee formally requested this material?

GOVERNMENT COUNSEL: We ask the court to confine its decision to the facts of this case, where there is a valid subpoena. Now, we ask the court to leave for another day any possible question concerning the Commission's legal obligation with respect to Congressional requests, as opposed to subpoenas for information. . . .

JUDGE ROBB: I know you ask us to do that, but we've got a right to think about it, and I'm asking you for your opinion.

GOVERNMENT COUNSEL: We think that it's unnecessary to reach the issue.

JUDGE ROBB: All right. All right, you don't want to answer the question.

GOVERNMENT COUNSEL: The answer to your question is that the view of the Federal Trade Commission, that they have expressed, is that they feel obligated to comply with Congressional requests. The other independent. * * *

JUDGE ROBB: I take it you allow me to have my opinion on it.

(Continued)

the dissent interprets it, this exchange indicates that "the legal position of the United States before this Court is that any presently intended compliance is based solely on the subpoena, and on no other request." Dissent, 5.

In our opinion, this is a strained reading of what was said at argument. Contrary to the dissent's interpretation, government counsel never stated that the FTC had repudiated its prior position and that "any presently intended compliance is based sole[981]ly on the subpoena." Quite the contrary, the brief filed by the Department of Justice on behalf of the FTC clearly states that "whether or not the subcommittee subpoena is technically valid (and it is), 15 U.S.C. § 46(f) *obligates* the FTC to comply with these official Congressional requests for information." Brief at 13. Counsel did urge that the court need not reach this back-up argument, since in his view the subpoena was valid: "We ask the court to confine its decision to the facts of this case, where there is a valid subpoena." Tr. 29. But that is a long way from conceding that if the court rejected counsel's opinion that the subpoena was valid (as the dissent does), it must ignore the grounds relied upon by the FTC when it acted originally, and upon which it still felt "obligated" to act.

[2] The reason counsel asked the court to uphold the FTC based on the subpoena is clear from the colloquy. Counsel forthrightly acknowledged that there may be some latent disagreement between the Department of Justice and the FTC regarding the *obligation* of regulatory agencies to comply with mere Congressional requests for information.[4] Thus, the dissent's repeated insistence on a single, unitary "legal position of the United States" is belied by counsel's explicit statement that the FTC and the Department of Justice may hold different views as to the correct interpretation of 15 U.S.C. § 46(f).[5] Far from indicating that the United States had "abandoned" the view adopted by the FTC, counsel articulated the FTC's position and then stated that the Department of Justice wished to "reserve" its

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GOVERNMENT COUNSEL: Yes. Your Honor. I hope to convince you that the subpoena here is clearly valid and that it's unnecessary to reach that issue.

JUDGE ROBB: For your information, I can't see that it makes any difference. Go ahead.

GOVERNMENT COUNSEL: Well, in the view of the * * *.

JUDGE ROBB: No matter what the FTC thinks.

GOVERNMENT COUNSEL: In the view of the other independent regulatory agencies and the Justice Department, it might make a difference. We take no position on the matter; we want to reserve our position on that point.

May 10, 1976 Tr., 28–30 [Conformed to tape recording].

[4] Government counsel stated that "the view of the Federal Trade Commission that they have expressed, is that they feel obligated to comply with Congressional requests." Tr., 29. On the other hand, counsel emphasized that the Department of Justice "take[s] no position on the matter; we want to reserve our position on that point." Tr., 30.

[5] Of course, there is no requirement that all agencies of the government adopt the same position with regard to matters under litigation. *See, e.g., McLean Trucking Co.* v. *United States*, 321 U.S. 67, 64 S.Ct. 370, 88 L.Ed., 544 (1944); *United States* v. *ICC*, 396 U.S. 491, 90 S.Ct. 708, 24 L.Ed.2d 700 (1970); *Seatrain Lines* v. *FMC*, 148 U.S.App.D.C. 424, 460 F.2d 932 (1972), *aff'd*, 411 U.S. 726, 93 S.Ct. 550, 34 L.Ed.2d 510 (1973); *United States* v. *CAB*, 167 U.S.App.D.C. 313, 511 F.2d 1315 (1975).

own position on the matter. Tr. 30. In our view, counsel's statements at oral argument meant no more and no less than what they said: that the Department of Justice felt it was "unnecessary to reach", Tr. 29, the request because it maintained that the subpoena was valid.

[3–7] Even if government counsel had attempted to disavow the basis on which the FTC acted—and it is clear from the foregoing that he did not—his statements could not bind the court to ignore the rationale on which the FTC's decision was actually based. No principle of adminstrative law is more firmly established than that a court must review discretionary actions in terms of the rationale on which the agency acted, rather than "accept appellate counsel's *post hoc* rationalizations," *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 169, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 87 L.Ed. 626 (1943). Without citation of authority, the dissent would go far beyond merely accepting appellate counsel's *post hoc* rationalizations and would hold that such rationalizations may actually *preclude* the court from considering the basis on which the agency in fact acted.[6] There is no support for this novel [982] doctrine. The analogy that comes closest is a confession of error by appellate counsel, but even there, it is settled that such a confession of error is not binding.[7]

Here, of course, the Department of Justice does not purport to "confess" that FTC committed legal error in deciding to turn over the

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[6] The dissent gives only one reason for dispensing with the principles of *Chenery*:

> In the case before us, * * * there is no issue of FTC expertise. On the contrary, the expertise involved is precisely the expertise of the Department of Justice: the orderly and consistent management of the litigation of the widely diverse agencies and departments of the United States Government. Dissent, 7.

It is true that where no special agency expertise is involved a court may *affirm* on a ground *in addition to* those relied on by the agency. *See, e.g., Local 833, UAW* v. *NLRB*, 112 U.S. App.D.C. 107, 300 F.2d 699, 705, *cert. denied*, 370 U.S. 911, 82 S.Ct. 1258, 8 L.Ed.2d 405 (1962). But a court's view that the agency is lacking in expertise has never been thought to license it to reverse while ignoring the grounds on which the agency relied.

Moreover, the dissent is simply in error when it asserts that the FTC's expertise does not bear on this case. The FTC's position that it is obligated to honor Congressional requests for information is based on its interpretation of 15 U.S.C. § 46(f), part of the Federal Trade Commission Act. The Supreme Court has directly held that administrative interpretations of such a statute, to which the courts are to accord "great weight," depend on the expertise of the *agency*, not appellate counsel. *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 626–7, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971):

> Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands. It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress. *Id.*, 628, 91 S.Ct. at 1097.

While we would be required to give "great weight" to the FTC's interpretation of 15 U.S.C. § 46(f), it is not necessarily controlling. However, we are not called upon in this case to determine whether the FTC's construction of the statute as obligating it to comply with all Congressional requests for information is correct. The Department of Justice is not authorized to press this issue. *Cf. S. & E. Contractors, Inc.* v. *United States*, 406 U.S. 1, 92 S.Ct. 1411, 31 L.Ed.2d 658 (1972) (authority to "conduct litigation" under 28 U.S.C. § 516 does not grant Department of Justice general power to challenge in court decisions of other government agencies). No other party has challenged the FTC's action on this basis. *See supra* note 2. Therefore, we express no opinion on the FTC's *obligations* in response to Congressional requests.

[7] *Orloff* v. *Willoughby*, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842 (1953); *Gibson* v. *United States*, 329 U.S. 338, 67 S.Ct. 301, 91 L.Ed. 331 (1947); *Young* v. *United States*, 315 U.S. 257, 62 S.Ct. 510, 86 L.Ed. 832 (1942); *See also McLean Trucking Co.* v. *United States*, 321 U.S. 67, 64 S.Ct. 370, 88 L.Ed. 544 (1944) (ICC affirmed despite confession of error by the United States).

materials to Congress; it merely "reserves" its own position on whether the FTC was *obligated* to do so.

III

Since we do not read the district court's opinion as finding Congressman Moss ever broke a promise of confidentiality, we have no occasion to address the grounds of his separate appeal.

We extend the stay previously entered for a period of 15 days from the date hereof to enable the parties to seek a further stay from the Supreme Court of the United States, if they are so advised.

So ordered.

MacKinnon, *Circuit Judge* (dissenting):

The majority opinion strips the Department of Justice of its litigating authority, effectively repeals 28 U.S.C. § 516, and wrests all substance from the role of oral argument in federal appellate court.

The majority opinion states that the very valuable trade secrets here involved may be surrendered to Congress "pursuant either to subpoena or formal request." Majority opinion, p. 979. The first trouble with this declaration is that the subpoena here is invalid under the House Rules. The second is that the Government at oral argument based its position solely on the subpoena and repeatedly refused to defend *any* claim that the agency had a right to comply with the "formal request," so that, with respect to a request short of a subpoena, the majority opinion is based upon a position that is not before it and which was expressly disclaimed.

The Government stated at oral argument that it was defending *only* the validity of the subpoena. That was the only issue the Government argued, and yet the majority would dispose of the case without even addressing the point. The reason for this is that the majority recognize that the subpoena is invalid, for the reasons hereafter stated. Given the invalidity, the case must be disposed of in appellant Ashland's favor because *the Government relies on no other basis* for surrendering the documents.

The majority opinion also misstates both the facts of the Government's presentation at oral argument and the law with respect [983] to the authority of the Department of Justice over the conduct of agency litigation.

I. The Facts and the Threshold Issues

By letter dated October 6, 1975, Congressman John E. Moss, writing in his capacity as a Member of Congress, requested the FTC to dislcose data which detailed the location of Ashland's natural gas reserves, and

which Ashland had submitted to the FTC. The request was treated as a request for information under the Freedom of Information Act, 5 U.S.C. § 551 *et seq.*, and was denied (J.A. 32–35). Subsequently, on October 29, 1975, this time in his official capacity as Chairman of the House Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, Mr. Moss again requested the data, to which the Commission responded that the data would be supplied (J.A. 36–39). Ashland filed this case in the District Court on November 24, 1975, seeking an injunction against Commission compliance with the request. On December 2, 1975, the full House Committee on Interstate and Foreign Commerce issued a subpoena *duces tecum* to the Commission Chairman for the data. On February 2, 1976, the District Court granted the Commission's motion to dismiss, considering Ashland's argument that Commission disclosure is barred by 15 U.S.C. § 46(f), but holding that there had been no showing of irreparable harm (J.A. 428–49). Ashland appeals the February 2 order. Mr. Moss, as intervening defendant, moved the District Court to amend the February 2, 1976, ruling to delete language alleged to imply that the Subcommittee or Mr. Moss had in the past breached obligations to handled information confidentially. The motion was denied on February 9, 1976 (J.A. 532). Mr. Moss appeals that order.

15 U.S.C. § 46(f) provides that the Commission shall have the power:

> To make public from time to time such portions of the information obtained by it * * * *except trade secrets* and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use. (Emphasis added).

Although Ashland alleges some past violations of confidentiality by defendants and states that "there has been no promise or commitment that Ashland's trade secret data would be given confidential treatment," (J.A. 446), these allegations do not constitute a substantial showing that the materials in the possession of the Commission will necessarily be "made public" if turned over to Congress. Therefore, it is not necessary to decide what application, if any, 15 U.S.C. § 46(f) might have if it were evident that Congress intended to "make public" trade secrets. At a minimum it is clear that absent such a showing 15 U.S.C. § 46(f) does not preclude the FTC from transmitting trade secrets to Congress, pursuant to subpoena.

Since the District Court's opinion is not to be read as finding Congressman Moss ever broke a promise of confidentiality, there is no occasion to address the grounds of his separate appeal.

However, this leaves two issues for resolution: whether the subpoena

itself was validly issued, and whether, if the subpoena is invalid, the House subsequently ratified the subpoena.

II. The Government's Position

At the very outset of oral argument, Government counsel firmly stated the position of the United States:

> Mr. Huddleson:[1] Chief Judge Bazelon, may it please the court, the central issue in this case is whether section 46(f) of the Federal Trade Commission Act gives the Commission any legal basis or any discretion to refuse to comply with *a valid Congressional subpoena* for trade secret information in the Commission's [984] possession. Our position is two-fold: we submit there is no imminent threat of irreparable injury warranting an injunction and that on the merits neither section 46(f) nor the Constitution prohibits the Commission from complying with a *valid Congressional subpoena* for trade secret information. I want to address the merits * * *
>
> Judge Robb: *Well, would it make any difference whether there was a subpoena or not, so long as the Subcommittee formally requested this material?*
>
> Mr. Huddleson: *We ask the court to confine its decision to the facts of this case, where there is a valid subpoena. Now, we ask the Court to leave for another day any possible question concerning the Commission's legal obligation with respect to Congressional requests, as opposed to subpoenas for information* * * *
>
> Judge Robb: I know you ask us to do that, but we've got a right to think about it, and I'm asking you for your opinion.
>
> Mr. Huddleson: We think that it's unnecessary to reach the issue.
>
> Judge Robb: All right. All right, you don't want to answer the question.
>
> Mr. Huddleson: The answer to your question is that the view of the Federal Trade Commission, that they have expressed, is that they feel obligated to comply with Congressional requests. The other independent . . .
>
> Judge Robb: I take it you allow me to have my opinion on it.
>
> Mr. Huddleson: Yes, Your Honor. I hope to convince you that the subpoena here is clearly valid and that it's unnecessary to reach that issue.
>
> Judge Robb: For your information, I can't see that it makes any difference. Go ahead.
>
> Mr. Huddleson: Well, in the view of the * * *
>
> Judge Robb: No matter what the FTC thinks.
>
> Mr. Huddleson: In the view of the other independent regulatory agencies and the Justice Department, it might make a difference. *We take no position on the matter; we want to reserve our position on that point.*

Taped transcript of oral argument, May 10, 1976 (conformed to tape recording)(emphasis added).

The only possible interpretation of the foregoing is that the legal position of the United States before this court is that any presently intended compliance is based solely on the subpoena, and on no other request.

In light of the actual statements at oral argument reproduced above, it is obvious that this was not a case of incidental mention that the subpoena was valid. The statements did not occur during a mere

[1] Edwin E. Huddleson, III, Civil Division, Appellate Section, Department of Justice.

"exchange" in the midst of oral argument; the Government in the *first* sentence of its *opening statement* firmly said it was proceeding only on the ground of *"a valid Congressional subpoena."* That was its predetermined position *prior to any question whatsoever from the bench.* Thus, subsequent attempts in the majority opinion to gratuitously label the position that the FTC was *obligated* to comply with congressional requests as a "back-up argument," and that the FTC "still felt [it was] obligated" to act on the mere request misstates the factual situation before this court at oral argument. The legal position of the FTC in the litigation was controlled by the Department of Justice.

The position of the United States in this litigation, has been set by the Department of Justice, pursuant to its statutory role and duty under 28 U.S.C. § 516:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

Burlington and *Chenery Corp.*, cited by the majority, *supra*, are not apposite. The majority relies on these cases for the proposition that appellant counsel cannot alter the [985] basis of an agency's action, *i.e.*, indulge in *post hoc* rationalization. *Burlington* relates exclusively to an instance in which the agency involved did not properly exercise its own expertise, or did not properly explain such exercise, and in which appellant counsel tried to operate in that area of expertise in order tc justify the agency's action. In *Burlington* the area of expertise was the Interstate Commerce Commission's analysis of the proper remedy in providing trucking service in the face of a labor dispute. 371 U.S. at 156–69, 83 S.Ct. 239. In *Chenery Corporation*, the SEC on appeal attempted to justify its approval of a plan of corporate reorganization on grounds which it had disavowed in acting on the plan.

In the case before us, the FTC never turned over any information on the mere request, and there is no issue of FTC expertise. On the contrary, the expertise involved is precisely the expertise of the Department of Justice: the orderly and consistent management of the litigation of the widely diverse agencies and departments of the United States Government. The issue in this case is a strictly legal one: the standards for conveying information between separate branches of government, a litigation matter squarely within the province of the Department of Justice. The agency is bound by the position taken by the legal representation of the Government.

The majority ponder the FTC's position and refer gingerly to the actual position stressed by Government *counsel* (majority opinion, pp.

980–981), implying that the Department of Justice does *not* control the litigation and legal position of the United States here, and implying that the Department of Justice is *not* empowered to speak through its attorney, in court, and on the record. 28 U.S.C. § 516 governs; the Department of Justice controls here, and, as to the role of oral argument, I am hard put to imagine what more the majority requires. Probably the Attorney General will have to arrange to appear personally in all cases.

The position of the Government, that it was claiming a right *only* to comply with a proper *subpoena*, is nonetheless valid for its having been the *only* position taken at oral argument. The Department of Justice and the Attorney General are certainly to be accorded the right so to delimit their argument, in the course of preparing the coordinated position of the United States. *There is no prejudice whatsoever to appellants in the delimitation, since the validity of the subpoena was asserted in the Government's brief.* (Government Br. at 13, reproduced *supra*), and there is no question that litigants may, in the course of proceedings, abandon arguments previously raised. *Abrams* v. *American Security & Trust Co.*, 72 App.D.C. 79, 80, 111 F.2d 520, 521 (1940). The actual merits of the case should thus be addressed.

III. The Subpoena

The subpoena directed the Chairman of the Federal Trade Commission the next day to deliver to the Subcommittee, *inter alia*, all records in its possession relating to oil and gas lease extensions on federal lands which involve Ashland Oil Co.

The Subcommittee claims it complied with the Rules of the House in issuing such subpoena and that accordingly the subpoena is valid. In particular it relies on Rule XI, cl. 2.(m), which provides:

> (1) For the purpose of carrying out any of its functions and duties under this rule and Rule X * * * any committee, or any subcommittee thereof, is authorized (subject to subparagraph (2)(A) of this paragraph) . . .
>
> * * * * * * *
>
> (B) to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents as it deems necessary. * * *
>
> (2)(A) A subpoena may be issued by a committee or subcommittee under subparagraph (1)(B) in the conduct of any investigation or activity or series of investigations or activities, *only when au*[986]*thorized by a majority of the members of the committee* * * *.

Rules of the House of Representatives, 94th Congress. (Emphasis added).

A resolution of the Committee on Interstate and Foreign Commerce,

which the Subcommittee claims authorized it to issue the subpoena in question, was offered on April 17, 1975, by Mr. Staggers, Chairman of the Committee. The resolution provided:

> RESOLVED, that in accordance with Rule XI, Clause 2.(m)(1) of the Rules of the House of Representatives, the Subcommittee on Oversight and Investigations, * * * [is] authorized to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents as they deem necessary in the conduct of such Subcommittees of *any investigation or activity or series of investigations or activities within their jurisdiction* as set forth in Rule X, Clause 1(b) of said House Rules and the Rules and procedures of the Committee on Interstate and Foreign Commerce. (Emphasis added).

(J.A. 407). In that Congress, at that time, 43 members constituted the Committee on Interstate and Foreign Commerce.[2] A "majority of the *members* of the Committee" would thus be 22 members. Committee records, however, disclose that only 21 members of the Committee voted for the resolution.[3] This is one member short of the required majority of the *members* of the Committee. Thus the subpoena issued by the Subcommittee was not properly authorized unless the rule is to be construed other than according to its plain meaning, as contended

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[2] 121 Cong.Rec. H 224 (daily ed. Jan. 20, 1975). —29 Members of Congress elected members of the Committee; 121 Cong.Rec. H 322 (daily ed. Jan. 28, 1975)—14 (Republican) Members of Congress elected members of the Committee; Cong. Directory, 94th Cong. 1st Sess., p. 294 (1975) indicates 42 members. Thereafter Congressman Jarman was taken off the Committee. However, he was replaced by Congressman Maguire on March 18, 1975. 121 Cong. Rec. H 1874. The 1976 Congressional Directory, p. 295, discloses that the Committee continued to be constituted with the same 43 members as in 1975.

[3] The resolution, as amended, was adopted 21–15, as shown by the following roll call vote ("P" indicates Proxy vote):

Thursday, April 17, 1975 (continued)

AYES	NAYS	ABSENT
Mr. Moss	Mr. Murphy	Mr. Macdonald
Mr. Dingell	Mr. Satterfield	Mr. Adams
Mr. Rogers	Mr. Byron	Mr. Carney
Mr. Van Deerlin	Mr. Devine	Mr. Waxman
Mr. Rooney	Mr. Broyhill	Mr. Hefner
Mr. Stuckey	Mr. Carter	Mr. Lent
Mr. Eckhardt	Mr. Brown	Mr. Madigan
Mr. Preyer	Mr. Skubitz	7
Mr. Symington	Mr. Hastings	
Mr. Metcalfe	Mr. Collins	
Mr. Scheuer	Mr. Frey (P)	
Mr. Ottinger	Mr. McCollister	
Mr. Krueger (P)	Mr. Heinz	
Mr. Wirth (P)	Mr. Moorhead	
Mr. Sharp	Mr. Rinaldo	
Mr. Brodhead (P)	15	
Mr. Florio		
Mr. Moffett		
Mr. Santini		
Mr. Maguire (P)		
Mr. Staggers		
21		

Mr. Dingell moved to reconsider the vote taken on the adoption of the resolution. Mr. Moss moved to table the Dingell motion to reconsider. CARRIED (VV). (J.A.409).

by the Subcommittee chairman, Congressman Moss. His brief and memorandum assert that his Subcommittee has duly authorized, in conformance with the above quoted provision of Rule XI, cl. 2.(m), 94th Congress, to issue the subpoena because the authorizing resolution was "passed by a majority of a *quorum* of the full committee." Supplemental Memorandum of Mr. Moss, filed May 14, 1976, p. 2 (emphasis added).

In the House of Representatives a quorum consists of a "majority of the committee."[4] There is no question there that a "majority of the committee" means of the *full* committee. Thus 22 members would constitute a quorum and, according to the construction the Subcommittee here advances, 12 members of the 43-member committee would be "a majority of a quorum" [987] and fully able to authorize a Subcommittee subpoena if only 22 members were present. The Subcommittee thus contends that a "majority of the committee" means 22 members in one rule and that "a majority of the *members* of the Committee" could mean 12 members in the other rule. The Supplemental Memorandum of the Subcommittee also argues at p. 2:

> The House of Representatives has consistently interpreted "a majority of the members of the Committee" (House Rule XI, § 2(m)(2) (94th Congress)) to mean a *majority of a quorum present and voting.* [*See* attached correspondence between Congressman Moss and Speaker of the House, the Honorable Carl Albert; App. 142 (affidavit of Michael Lemov ¶ 7)].

In support of the above position the Supplemental Memorandum attaches a copy of a letter of May 13, 1976 from the Honorable Carl Albert, M.C., Speaker of the United States House of Representatives, to the Chairman of the Subcommittee, the Honorable John E. Moss, M.C. The text of this letter in its entirety reads as follows:

> Dear Mr. Chairman:
>
> I have received your letter of May 11, 1976, regarding the interpretation of House Rule XI, clause 2(m), which authorizes committees of the House of Representatives to issue subpenas.
>
> There is no indication in the legislative history of the rule, which was adopted in the 93d Congress to become effective January 3, 1975, of any intent to require a different procedure for voting on subpenas than on other votes taken in House committees. Under the customary and correct practice of the House of Representatives, which derives its rule-making authority from the Constitution (Article I, Section 5, which provides that a majority of the House shall constitute a quorum for doing business), committee action is valid which is authorized by a majority of those Members voting, a quorum being present. It would create an anomalous situation to require a more stringent standard for authorizing the issuance of a subpena than for finding a witness in contempt of a committee for refusing to honor such a subpena, or for taking a final committee action in ordering a measure or matter reported to the House.

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[4] Rules of the House of Representatives, 94th Cong. XI, cl. 2(1)(2)(A) (hereinafter cited as House Rules).

This letter correctly states that in the House of Representatives a majority of legal votes cast, a quorum being present, is generally sufficient to carry a proposition. This can be proved by a cursory examination of the proceedings in the House over any long or short period of time. And the "Rules of the House are the rules of its committees and subcommittees so far as applicable * * *"[5] This is also the clear rule of the common law.[6] Moreover:

> Where a majority or other proportion of votes is required without specifying whether the vote refers to the entire membership or to the members present, or to the members present and voting, the general rule is that the proportion refers to the number present and voting.

Mason's Legislative Manual, Sec. 510, Para. 2 (1970), and cases cited therein. However:

> Where a * * * controlling provision of law requires a majority vote of the entire *membership* or of all members present or any other number or proportion to take action; that vote must be obtained, and a vote less than that number, although a majority of those present and voting, a quorum being present, is not sufficient. Mason's Legislative Manual, Sec. 511, Para. 1 (1970)(emphasis added).[7]

[988] There are many instances in which controlling provisions of law and the rules require something more than a majority vote of a quorum. Several instances appear in the Rules of the House of Representatives. Rule XXVII, cl. 1. for suspension of rules requires "a vote of two-thirds of the Members voting, a quorum being present * * *."; Rule XXIV. cl. 7, provides that the normal business of the House shall not be altered "unless the House by a two-thirds vote on motion to dispense therewith shall otherwise determine"; Rule XXIV, cl. 6, for a similar purpose requires a "two-thirds vote on motion to dispense therewith * * *"; and Rule XI, cl. 4.(b) to cali up for consideration a report of the Rules Committee on the same day it is presented to the House requires "a vote of not less than two-thirds of the Members voting * * *."

The Constitution in several instances also requires more than a

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[5] House Rules XI, cl. 1.(a)(l).

[6] Mason's Legislative Manual, Sec. 510, Para. 1 (1970), and cases cited therein.

[7] Citing:

Pimental v. *San Francisco* (1863), 21 Cal. 351; *McCracken* v. *San Francisco* (1860), 16 Cal. 591; *People* v. *Wright* (1902), 30 Colo. 439, 71 P. 365; *State* v. *Fagan* (1875), 42 Conn. 32; *Anniston* v. *Davis* (1893), 98 Ala. 629, 13 So. 331; *Evanston* v. *O'Leary* (1897), 70 Ill.App. 124; *McLean* v. *East St. Louis* (1906), 222 Ill. 510, 78 N.E. 815; *Logansport* v. *Legg* (1863), 20 Ind. 315; *Cascaden* v. *Waterloo* (1898), 106 Iowa 673, 77 N.W. 333; *Hansen* v. *Anthon* (1919), 187 Iowa 51, 173 N.W. 939; *Warnock* v. *Lafayette*, 4 La.Ann. 419; *Zieler* v. *Central Power Co.* (1896), 84 Md. 304, 35 A. 932; *Stockdale* v. *Wayland School Dist.* (1881), 47 Mich. 226, 10 N.W. 349; *Whitney* v. *Hudson* (1888), 69 Mich. 189, 37 N.W. 184; *State* v. *Reichmann* (1911), 239 Mo. 81, 142 S.W. 304; *Edgerly* v. *Emerson* (1851), 23 N.H. 555, 55 Am.Dec. 207; *Baker* v. *Police Com., Port Huron* (1886), 62 Mich. 327, 28 N.W. 913; *State* v. *Wilkesville Tp.* (1870), 20 Ohio St, 288; *Leavitt* v. *Oxford etc. Silver Mfg. Co.* (1883), 3 Utah 265, 1 P. 356; *State* v. *Bevins* (1898), 70 Vt. 574, 41 A. 655; *Grindley* v. *Barker* (1798) (Eng.), 1 B. and P. 229, 126 Reprint 875; *Blacket* v. *Blizard* (1829), 9 B. and C. 851, 109 Reprint 317.

Mason's Legislative Manual 350–51 (1970).

majority vote of a quorum. For the Senate to convict on impeachment requires "the Concurrence of two thirds of the Members present." U.S. Const. art. I, § 3. To expel a member from Congress requires "the Concurrence of two thirds. * * *" *Id.*, § 5. A roll call in either House shall be entered on the journal "at the Desire of one fifth of those Present. * * *" *Id.*, § 5. Passing a "bill" over a President's veto requires for both the House and the Senate "two thirds of that House. * * *" *Id.*, § 7. Similarly, "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" if the President disapproves of same shall be repassed "by two thirds of the Senate and House of Representatives * * *." *Id.*, § 7. The President may make treaties "provided two thirds of the Senators present concur * * *." U.S. Const. art. II, § 2. Amendments to the Constitution may be proposed "whenever two thirds of both Houses shall deem it necessary * * *." *Id.*, art. V. A constitutional convention to propose amendments may be called upon "Application of the Legislatures of two thirds of the several States * * *." *Id.*, art. V. Constitutional amendments shall be valid "when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof * * *." *Id.*, art. V. The Twelfth Amendment for the election of President requires "a majority of the whole number of Electors appointed * * *.", and in electing a President in the House of Representatives a quorum consists "of a member or members from two-thirds of the states, and a majority of all of the states shall be necessary to a choice." The same amendment provides that the Vice President shall be the person "having the greatest number of votes * * * if such number be a majority of the whole number of Electors appointed * * *.", and, if no person has a majority, the Senate chooses the Vice President at a meeting at which "a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice." The Fourteenth Amendment, § 3, provides that the disability thereby imposed for having "engaged in insurrection or rebellion against the" United States could be removed by Congress "by a vote of two-thirds of each House * * *."

So it is customary and usual in many instances for Congress to be required to act by some required vote which exceeds a majority of a quorum.

[989] We must thus decide whether Congress in adopting Rule XI, cl. 2.(m)(2)(a), *supra*, requiring "a majority of the *members* of the committee" intended to require a majority of the *membership* of the committee or a majority of a *quorum* of the committee. As indicated above this can mean a maximum difference between requiring 22

members or 12 members to authorize subpoenas. This is a difference between a majority and a minority of the committee.

> The Speaker's letter, *supra*, asserts that There is no indication in the legislative history of the rule * * * of any intent to require a different procedure for voting on subpoenas than on other votes taken in House committees.

This statement is in error. When the House of Representatives in the 2d Session of the 93d Congress adopted H.Res. 988 it sought to reform the subpoena-issuing practices of its committees. *The resolution changed the prior rule, which had allowed a "majority of a quorum," into a requirement of "a majority of the members" to issue subpoenas. See, e.g.*, Rules of the House of Representatives, 93d Cong. XI, cl. 2.(b) and *id.*, 94th Cong. XI, cl. 2.(m)(2)(a), *supra*. The resolution making this change in the long-standing rule was entitled the "Committee Reform Amendments of 1974." Requiring "a majority of the *members* of the committee," rather than a "majority of a quorum," to authorize the issuance of subpoenas was a part of that reform. Accompanying the Resolution to the floor of the House was the Report of the sponsoring Select Committee on Committees, which, with respect to the "SUBPENA POWER," stated:

> The select committee proposes certain standardized procedures and safeguards covering subpenas that would apply uniformly to all committees. The Committees on Appropriations, Government Operations, and Standards of Official Conduct would continue to have standing subpena authority, while others would be required to receive House authorization for each activity or series of activities. However, in the case of all committees, a majority of the *membership* of each committee would be necessary to authorize the issuance of a subpena or group of subpenas. Compliance could be enforced only as authorized or directed by the House.[8] (Emphasis added).

This clearly indicates that the intent of the authors of the Rule was to require the votes of a majority of the *"membership"*—and since the membership of the Committee is just one figure—43—the Rule would clearly require 22 votes to issue a subpoena. We find no distinction between "a majority of the *membership* of each committee," as used in the Report, and "a majority of the *members* of the committee," as used in the Rule which the Report discussed. The "membership" of the committee is 43 and there are 43 "members of the committee."

The interpretation of the words "of the members" to refer to all persons named to the body is the unequivocal rule of common law. This was the holding in the Supreme Court of Judicature of Indiana in *Logansport* v. *Legg*, 20 Ind. 315 (1863), in which the court, regarding a city council's vote to authorize certain city improvements, construed a city charter providing that improvements could be ordered by the

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[8] H.R.Rep. No. 93-916, Part II, 93d Congress, 2d Sess. 6 (1974).

"council, with the concurrence of two-thirds *of the members* thereof * * *" The court wrote:

> The order appears to have been voted for and passed, by two-thirds of the members then present, but the transcript very clearly shows that the city council of Logansport is composed of 10 members, and the charter, as has been seen, affirmatively requires the concurrence, to such order, of two-thirds *of the members*. As the order in question was concurred in by only 6 members, and that number not being two-thirds of the city council, it must be deemed a nullity.

20 Ind. at 317 (emphasis added). Similarly, the Supreme Court of Alabama held, in *Anniston* v. *Davis*, 98 Ala. 629, 13 So. 331 (1893), regarding the contested election of **[990]** one Davis to succeed to the seat of a resigned council member:

> It will be noticed that the common council is composed of eight members. At the meeting at which Davis was elected only five members were present. To fill the vacancy occasioned by the resignation of Riddle by the terms of the charter "a majority vote *of the remaining members*" was necessary. The minutes of the council as corrected show that only three members, one less than a majority of the remaining members, voted for Mr. Davis. If this be true, he was never legally elected. The council have no authority to disregard the charter provision. No subsequent approval or ratification could legalize or make valid a disregard of this mandate of the charter. *The rule that a majority of a quorum controls has no application under such a provision.*

13 So. at 332 (emphasis added). A similar interpretation was given to "a majority of the *members* of the board" (emphasis added) in *Houser* v. *School District of South Sioux City*, 189 Neb. 323, 202 N.W.2d 621, 623–24 (1972) against arguments similar to those advanced here that the language meant a majority of a quorum. In reaching its decision on a Nebraska statute the court stated:

> We see no distinction between the phrasing "a majority of all members," and "a majority of members." * * * The language used indicates to us the intention to require a majority of all members of the board, and not a majority of the quorum.

202 N.W.2d at 624. I find no cases to the contrary.

In looking at the House Rule, and its history, it is also supportive of the above interpretation to note that if the House had intended the normal rules in the House to apply there would not have been any necessity to adopt the provision that it did adopt. It could have just said nothing about the vote required to issue "subpenas" and the general majority of a quorum rule would have stated the required vote. Thus, what the Subcommittee are arguing for is an interpretation that would make matters as though the reform change was never adopted. But, as the Committee Report and the Rule both indicate, the obvious intent was to *reform* the subpoena issuing practices, *inter alia*, by requiring a majority vote of the members (membership).

To permit a *minority* of the members of a committee to control its

actions in matters as important as issuing subpoenas is contrary to democratic principles and breeds congressional absenteeism. It allows a small number of committee members to exercise vital governmental powers over the rights of citizens that a majority should exercise. When Congress was reforming committee practices by providing safeguards against abuses in the issuance of subpoenas by committees, they were well advised to require a vote by a majority of the *members* of a committee for the issuance of subpoenas. Subpoenas are very powerful weapons and capable of much abuse. The instant subpoenas are a good example of the tremendous power that may be exercised by Congress through these investigatory instruments. They seek to compel the surrender to Congress of trade secrets worth millions of dollars, the value of which can be utterly destroyed by mere disclosure to the public. If the House does not wish to require a vote of a majority of the *members* of a committee before issuing such an intrusive document, the House can easily change the rule. There is nothing to the argument that an anomalous situation would be created by such interpretation of the rule because a majority of a quorum of the *full House* (435 members at maximum) can pass a contempt resolution. That is the rule in the *full House*, and Rule XI states the rule in committee. This likewise is no technical point, because given the dire consequences of disclosure of the subject data, the committee might be unable to get the additional vote to authorize the subpoena or the committee might impose some needed safeguards against disclosure of the data.

Since the necessary vote was not obtained for the issuance of the subpoenas in ques[991]tion it follows that the subpoena was invalid.[9]

IV. Ratification

It is further contended by the Subcommittee that the House ratified the subpoena when it voted to authorize Subcommittee Chairman Moss to appear as an intervenor in this action, in which the validity of the subpoena is in question. I cannot agree. The argument fails to

[9] It was the Commission's position at oral argument in this court that the case should be decided exclusively on the basis of the subpoena. This can only be interpreted to mean that the Commission's presently intended compliance is based solely on the subpoena, and not on the letter request. Therefore, I do not deal with the letter request of October 29, 1975.

Since a properly authorized subpoena is required for the production of the requested trade secrets, it should also be noted that the Rule provides:

> A subpena may be issued by a committee or subcommittee under subparagraph (1)(B) in the conduct of any investigation or activity or series of investigations or activies, only when authorized by a majority of the members of the committee * * *

House Rules XI, cl. 2.(m)(2)(A). Thus, subpoenas may be issued by a *subcommittee* "only when authorized by a majority of the members of the committee * * *" in "the conduct of any investigation or activity or series of investigations or activities * * *." It seems clear that such language requires the committee authorization for subcommittee subpoenas to relate to some specific investigation or series of related investigations and does not authorize conferring upon a subcommittee blanket authority to issue subpoenas in any investigations it may decide to conduct. The authorizing resolution should designate the particular investigation.

comprehend the scope of the subpoena rule. The intent of that rule is to provide for the orderly consideration by the committee as to whether subpoenas should issue and to assure that a majority of the members of the committee are sufficiently convinced of the necessity and importance of issuing the subpoena to attend[10] the committee meeting and vote in favor of that action *before* the subpoena issues. *Shelton* v. *United States*, 117 U.S. App.D.C. 155, 327 F.2d 601 (1963). The committees of Congress must strictly conform to their rules in obtaining testimony before its committees. *Yellin* v. *United States*, 374 U.S. 109, 83 S.Ct. 1828, 10 L.Ed.2d 778 (1963); *Christoffel* v. *United States*, 338 U.S. 84, 69 S.Ct. 1447, 93 L.Ed. 1826 (1949); *United States* v. *Reinecke*, 173 U.S.App.D.C. 274, 524 F.2d 435 (1975). Further, it does not appear from the language of the Resolution that there was any intent to ratify the subpoena, even if that could be done. Such intent must be evident, and it must also be evident that the ratifying party has knowledge of the material facts, in this case, the material fact of a violation of the House Rules. *Western Nat. Bank* v. *Armstrong*, 152 U.S. 346, 352, 14 S.Ct. 572, 38 L.Ed. 470 (1894); *Bloomfield* v. *Charter Oak Nat. Bank*, 121 U.S. 121, 135–36, 7 S.Ct. 865, 30 L.Ed. 923 (1887).

CONCLUSION

Since the subpoena is invalid, it is my view that an injunction should issue prohibiting the enforcement thereof. However, this does not foreclose the Commission from conveying the material to the Subcommittee pursuant to a subpoena that is properly authorized.

For the foregoing reasons I respectfully dissent.

[10] The validity of the four proxy votes which were recorded as cast for the Resolution is not considered in this opinion. *Cf.* VIII Cannon's Precedents of the House of Representatives § 2219, *id.* VII, § 1014.

UNITED STATES OF AMERICA v. GOLDEN FIFTY PHARMACEUTICAL CO., INC., et al.*

No. 74 C–1124. F.T.C. Docket No. 8792.

(United States District Court, Northern District of Illinois, Eastern Division, September 21, 1976)

1. THE TWO-STEP PROCESS IN DETERMINING WHETHER ADVERTISEMENTS VIOLATED CEASE AND DESIST ORDER CONSISTED OF CONSTRUING OR INTERPRETING ORDER, A QUESTION FOR THE COURT, AND DETERMINING FACTUAL ISSUES AS TO WHETHER DISPUTED ADVERTISEMENTS FELL WITHIN SCOPE OF ORDER, A PROBLEM FOR THE FACT-FINDER.

   Determining whether advertisement violated cease and desist order by Federal Trade Commission was two-step process, the first step being to construe or interpret the order itself, and same being a question of law for the court, and the next step being to determine factual issues as to whether challenged advertisements fell within scope of order as construed; latter problem was for trier of fact unless case was appropriate for summary judgment.

2. ON MOTION FOR SUMMARY JUDGMENT, DOCTOR'S AFFIDAVIT CONCERNING SPECULATIVE RESULTS OF CONSUMER POLL THAT HAD NOT TAKEN PLACE COULD NOT BE CONSIDERED, AND HIS TESTIMONY TO THE SAME EFFECT WOULD BE INADMISSIBLE.

   In action to collect civil penalties for alleged violation of Federal Trade Commission cease and desist order, doctor's testimony as to what results of poll of consumers would have been were they asked of their impressions of advertisements would not have been admissible nor could his affidavit to that effect be considered on motion for summary judgment.

3. REGARDLESS OF CONSUMER REACTION TO REPRESENTATIONS, INJUNCTION AGAINST SUCH REPRESENTATIONS WOULD BE HONORED.

   [1200] Injunction against making certain representations by advertisements would be honored regardless of whether consumer was taken in by the representations.

4. ALLEGATION WAS ADMITTED, WHERE NOT DENIED IN DEFENDANTS' ANSWER.

   Allegation not denied in defendants' answer was admitted.

5. ADVERTISEMENTS, CONTAINING DIRECT OR IMPLIED REPRESENTATIONS THAT DEFENDANTS MANUFACTURED VITAMIN OR MINERAL PREPARATIONS OR MAINTAINED LABORATORY FACILITIES, VIOLATED CEASE AND DESIST ORDER.

   Advertisement which showed two men working and which also contained, inter alia, references to "discovery" and "formulation" and testimonial thanking "your chemist and whoever concocted the pleasant way to take vitamins" violated Federal Trade Commission's cease and desist order against advertisements representing directly or by implication that defendants were manufacturers of vitamin and/or mineral preparations or maintained laboratory facilities.

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* Reported in 421 F.Supp. 1199 (1976). For case before the Commission, see 77 F.T.C. 277.

6. ORDER WAS VIOLATED BY ADVERTISEMENTS WHICH STATED THAT OFFER WAS A "SPECIAL LIMITED OFFER," THAT "SUPPLIES ARE LIMITED," AND/OR THAT OFFER WAS AT "LOW 'INSIDER'S PRICES'."

Advertisements stating that "Special Limited Offer" that "Supplies are limited" and that offer was at "low 'insider's prices' " violated Federal Trade Commission's cease and desist order against representing directly or by implication that offer was made to only limited customer group or for only a limited period of time when no such limitations were imposed.

7. ONLY WHERE COURT SEES A NEED FOR MORE EVIDENCE IS A HEARING ON QUESTION OF NUMBER OF VIOLATIONS MANDATED.

Hearing is mandated on question of number of violations of cease and desist order by Federal Trade Commission only if court perceives need for more evidence on question.

8. ISSUE AS TO NUMBER OF VIOLATIONS FOUND WAS A QUESTION OF LAW, AND AS A MATTER OF LAW, COURT FOUND 16 VIOLATIONS.

Where defendant admitted 14 mass mailings found by the court in violation of cease and desist order by Federal Trade Commission and two individual mailings charged in another count, issue whether such incident constituted 16 or fewer violations of the cease and desist order was question of law and, as matter of law, there were 16 violations.

(Syllabus, with substituted captions, taken from 421 F.Supp. 1199)

In action to collect civil penalties, and for injunctive relief, court held that certain advertisements violated F.T.C. cease and desist order and where defendant admitted to 14 mass mailings as charged in one count and two individual mailings in another count, there were in total 16 violations of the order.

Motions granted; liability of defendants adjudicated.

Gregory B. Hovendon, Chief, *John R. Fleder,* Atty., Consumer Affairs Section, U.S. Dept. of Justice, Washington, D.C., *Samuel K. Skinner,* U.S. Atty., *Jack M. Wesoky,* Asst. U.S. Atty., Chicago, Ill., for plaintiff.

William F. Weigel, Rogers, Hoge & Mills, New York City, *Daniel W. Vittum, Jr., Kirkland & Ellis,* Chicago, Ill., for defendants.

Before MARSHALL, *District Judge.*

MEMORANDUM DECISION

The United States has brought this action to collect civil penalties from the defendants Golden Fifty Pharmaceutical Co., Inc. (Golden Fifty), and Michael Posen, Golden Fifty's president, pursuant to 15 U.S.C.A. §§ 45(l), 49, and 52, for violation of a Federal Trade Commission cease and desist order which became final on June 29, 1970. The United States also requests permanent injunctive relief. Jurisdiction is based upon 28 U.S.C. §§ 1337, 1345, and 1355. The

plaintiff's motion for summary judgment, Fed.R.Civ.P. 56, is ready for decision on the memoranda, exhibits, and affidavits submitted by the parties.

[1201] In material part, the Commission's order provided:

> It Is Ordered that respondents Golden Fifty Pharmaceutical Co., Inc., a corporation, and its officers, and Michael Posen, individually and as an officer of said corporation, and its agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the preparation designated "Golden 50 Tabulets," or any food, drug, device or cosmetic do forthwith cease and desist from directly or indirectly:
>
> 1. Disseminating or causing the dissemination of, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which:
>
> (a) Represents directly or by implication that respondents are manufacturers of vitamin and/or mineral preparations or maintain laboratory facilities concerned with the formulation, testing or performance of vitamin and/or mineral preparations.
>
> (b) Represents directly or by implication that any product is offered free or under any other terms when the offer is used as a means of enrolling those who accept the offer in a plan whereby additional supplies of the product are shipped at an additional charge unless all of the conditions of the plan are disclosed clearly and conspicuously and within close proximity to the "free" or other offer.
>
> (c) Represents directly or by implication that an offer is made without "further obligation," or with "no risk," or words of similar import denoting on the part of the recipient of such offer when in fact there is an obligation incurred by the recipient.
>
> (d) Represents directly or by implication that an offer is made to only a limited customer group or for only a limited period of time when no such limitations are imposed by respondents.
>
> 2. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of respondents' products in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations or misrepresentations prohibited by Paragraph 1 hereof.

Second Amended Complaint ¶ 7.

The second amended complaint alleges that from October of 1970 to July of 1975 the defendants used several mailing services to disseminate advertisements which violated the cease and desist order. Specifically, Count I charges that the defendants made fourteen mass mailings of advertisements which violated ¶¶ 1(b) and (c); Count II alleges that defendants made an unspecified number of mailings of an advertising leaflet identified as "L–130" in violation of ¶¶ 1(a) and (d); and Count III charges that the defendants mailed an advertisement in violation of ¶ 1(b) to two individuals. By their answer to the second amended complaint, the defendant admitted liability for the conduct charged in Counts I and III of the second amended complaint, but reserved the right to contest the number of violations for which they would be liable and against which the statutory penalties could be

assessed. Liability was not admitted for the allegations of Count II. Plaintiff has moved for summary judgment on two issues: defendant's liability for the violations alleged in Count II; and, the proper calculation of the number of violations represented by the charges in Counts I and III. Each issue will be treated in turn.

I. Appropriateness of Summary Judgment on Count II

[1] Determining whether the advertisements violate the cease and desist order is a two-step process. The first step is to construe or interpret the order itself. This **[1202]** inquiry is generally perceived as a question of law for the court. *E.g., United States* v. *J. B. Williams Co., Inc.*, 498 F.2d 414, 431 (2d Cir. 1974). The next step is to determine whether the challenged advertisements fall within the scope of the order as construed. The cases reveal some disagreement as to whether this is a question of law for the court or a question of fact for the trier of fact. In *United States* v. *Vulcanized Rubber & Plastics Co.*, 288 F.2d 257, 258 & n.2 (3d Cir. 1961), the court indicated the question is one of law. The court correctly stated that its role in an action to recover civil penalties, is not to determine whether the challenged practice is deceptive, but merely to consider whether the practice falls within the order's proscription. But drawing this distinction does not answer the question whether the latter analysis involves factual or legal determinations. *J. B. Williams, supra,* squarely confronted this problem, and found that factual issues are presented. Briefly, the court cited the general rule that the trier of fact decides disputes concerning the meaning and effect of words and acts, particularly if their interpretation depends upon a choice among the reasonable inferences to be drawn from extrinsic evidence. 498 F.2d at 432. Nonetheless, summary judgment is appropriate if the evidence supporting a given interpretation is so clear that a directed verdict would be warranted. *Id.;* 6 J. Moore, *Federal Practice* ¶56.04[2] (2d ed. 1976). Lacking pertinent authority from this circuit, we adopt the well-reasoned approach of the Second Circuit.

The meaning of ¶¶1(a) and (d) of the cease and desist order is clear. Paragraph 1(a) prohibits defendants from disseminating through the mails any advertisement which directly (*i.e.*, expressly) or by implication represents that they manufacture Golden 50 Tabulets, or maintain laboratory facilities for testing the tabulets' performance. Paragraph 1(d) prohibits defendants from disseminating through the mails any advertisement which represents directly (*i.e.*, expressly) or by implication that an offer of Golden 50 Tabulets is made only to a limited group of customers or for only a limited period of time when no limits are in fact imposed. There is no question that L–130 was disseminated

through the mails and so the remaining issue is whether, as plaintiff alleges, L–130 makes or implies these prohibited representations.

L–130 consisted of the following (see Plaintiff's Memorandum Att. 1, Exh. B): See Figures 1 and 2 on following pages.

[1204] As presented to the recipient, the leaflet is folded in thirds. The right hand column of Figure 1, attached, bearing the picture of Johnny Weissmuller, is the front "cover"; the middle column of Figure 1, with the order form, is the back "cover"; the left hand column of Figure 1 is folded inside so that it is the first item seen if the recipient opens the front cover (pursuant to the exhortation "Announcing 'Discovery '72'—See Exciting Details").

The material appearing on Figure 2 is printed on the reverse side of all of Figure **[1205]** 1 and is available to the recipient if he or she unfolds the flier.

[2] Plaintiff offers the affidavit of Dr. Ivan L. Preston to support its contention that L–130 violates ¶ 1(a) of the order. See Plaintiff's Memorandum, Att. 1. Dr. Preston's affidavit is a bobtailed version of the results of a consumer reaction opinion poll. After reciting his experiences with such polls, he proceeds to express his opinion as to what the results of a poll of consumers would be were they asked their impressions of L–130. He concludes on the basis of certain of the language of L–130 and the picture of the two men working in a laboratory, that "a large majority of persons * * * would conclude that [L–130] * * * represents directly or by implication that Golden Fifty Pharmaceutical Co. Inc., is a manufacturer of vitamin preparations and/or it maintains laboratory facilities concerned with the formulation, testing or performance of vitamin preparations * * * [and] * * * represents directly or by implication that the offer being made * * * is available for only a limited period of time." *Id.* at 3–4. Assuming

GOLDEN-50 DISCOVERY '72 CERTIFICATE

GOLDEN 50 CONSUMER PROTECTION GUARANTEE

The wonderful Golden-50 Vitamin C or Vitamin E Discovery is available only in Golden-50 capsules. If not delighted, if you have any doubt as to purity or quality, then simply return the unused portion within 30 days after receipt and Golden 50 will refund your money in full.

OUR PLEDGE AND OUR PROMISE

Golden-50 vitamins are unconditionally guaranteed to be as stated on the label. Take Golden-50 vitamins confidently. They are produced, formulated to strictest purity and potency standards.

"Serving the health needs of America for over 10 years."

List each day completely—with infinite energy and a zest for life.

You be the judge by taking advantage of these special offers from Golden Fifty

Golden

A Message To Customers:

The GOLDEN-50 "Discovery '72" formulation is a valuable "nutrition extra" that actually permits supplementation to your bodily vitamin levels. IF you, as a regular customer, USE our products.

For aid towards the goal of total MDR* vitamin-security you are urged to take advantage of the offer we proudly describe inside as "DISCOVERY '72."

PLAINTIFF'S EXHIBIT

Golden

SPECIAL ROUTINE:

All products in this brochure are sold to Golden-50 Customers at low "insider's prices." Supplies are limited. Prices are subject to change without notice.

Golden-50 vitamins are not available at drugstores—they are available only direct-by-mail.

SPECIAL CUSTOMER ORDER FORM

Enclosed is my check or money order. Please ship my order as shown below. I understand that if I am not delighted I may return the unused portion for a full refund within 30 days.

VITAMIN C TABLETS

( ) 75 Tablets ... $1.95
( ) 200 Tablets ... $4.00
(I save $3.00)

VITAMIN E CAPSULES

( ) 60 Tablets ... $2.95
( ) 120 Tablets ... $4.90
(I save $1.00)

( ) 300 Tablets ... $9.75
(I save $5.00)

GOLDEN FIFTY PAYS ALL SHIPPING CHARGES

( ) MONEY ORDER
( ) CHECK

Name (please print)

Address

City State Zip Code Age

DON'T PUT IT OFF... SEND YOUR ORDER TODAY!

GOLDEN-50 PRODUCTS OF CALIFORNIA, INC.
5380 N. Kolby ... Hollywood, California 90028

Special Limited Offer from Golden

LISTEN FOLKS—

"If, like myself, you are interested in blessed, radiant, glowing health for your body, then read inside about the new famous GOLDEN-50 FORMULATED helpful, powerful VITAMINS C and E!

IT'S IMPORTANT NEWS—TAKE MY WORD FOR IT!

Yours truly,

ANNOUNCING "DISCOVERY '72"

Figure 1

Presenting "DISCOVERY '72"—Golden-50's New Vitamins C and E are now available
...at "INSIDER'S PRICES"
YES! Wonderful Vitamins C and E are two of Nature's most enriching rewards! Why, each vitamin is like a nutritious powerhouse-building block of vigorous health! Now Golden-50 has Vitamins C and E to help your body keep "nutrition-secure" and "vitamin-safe!"
NEW! VITAMIN C TABULETS
...323 mg. per tabulet of sweet, orchard freshness and vital high-potency protection!
Packed with over ten times the MDR!* The human body cannot store Vitamin C. This vitamin must be replenished with regularity.
A fresh supply of Vitamin C is required regularly to fortify your system and to maintain good health during normal activities. Food alone may not supply enough Vitamin C protection for you.
Golden-50 Vitamin C Tabulets
Bottle of 75.....Only $1.95
Save $3.50! Order Economy Size!
Bottle of 300.....Only $4.80
*Minimum Daily Requirement
NEW! VITAMIN E TABULETS
...138 I.U.s of di-Alpha-Tocopheryl-Acetate—Vitamin E in a super-concentrate dietary supplement.
The "publicized vitamin" that's talked about and makes news.
Living and thrilling to all life's pleasures is best when you feel right. It's most important that your personal diet contains all of the Vitamin E you need. The MDR* for Vitamin E is unestablished—make certain you are getting plenty by regularly taking this vital nutrient.
Golden-50 Vitamin E Tabulets
Bottle of 60.....Only $2.95
Save Money! Save $1.00!
Bottle of 120.....Only $4.90
Save Even More! Save $5.00!
Bottle of 300.....Only $9.75
Vitamins are a nutritious food supplement and aid the human body to glowing good health and happiness. Your family doctor will tell you so.
National Praise for GOLDEN-50 Vitamin Tabulets
"I was surprised how pleasant the Golden-50 Tabulet tasted when it went down. Thank your chemist and whomever concocted the pleasant way to take vitamins."
H. Estoeni
032 San Bruno Ave., San Francisco, Calif.
"When you sent me the Golden-50 Tabulets, I was already taking some others. After taking yours for a month I do appreciate your help so much. You are giving a wonderful service."
Andrena Marshak
144 S. La Peer Dr., Beverly Hills, Calif.
"I want to continue to take them as long as I live. I wish everybody could use them to be I do."
Jane Powe
2238 Morton Ave., Jackson, Miss.
Unconditional money-back guarantee—no questions asked
Lowest prices for greatest savings
Shaped and sized Tabulets for ease of swallowing
Pressure compacted to "lock in" freshness
All shipments delivered postpaid right to your door
Guarantee of purity, wholesomeness and finest quality
Each vitamin container is hermetically sealed to highest sanitation standards, and to safeguard freshness
Each vitamin container is date-coded to insure potency
You receive the newest products of vitamin science research, always improved, always formulated for best health and peace of mind
You have assurance ... the Golden-50 tradition of integrity and excellence ... for over 10 years
SEE CONSUMER PROTECTION GUARANTEE ON BACK PANEL
GOLDEN-50'S NO RISK OFFER: YOUR MONEY BACK IF NOT DELIGHTED... NO QUESTIONS ASKED. SEND TODAY.

Figure 2

the relevancy of the results of consumer reaction polls in cases such as this in which the issue is not whether defendants' advertising is deceptive (that issue having been previously adjudicated by consent) but whether defendants have violated certain precise provisions of a cease and desist order, Dr. Preston's bobtailed version of the poll most certainly would not be admissible. Thus, he would not be heard to testify on the trial of the case as to the results of a poll which had never been taken. *Cf. Zippo Manufacturing Co.* v. *Rogers Imports, Inc.*, 216 F.Supp. 670 (S.D.N.Y. 1963); *Union Carbide Corp.* v. *Ever-Ready Inc.*, 531 F.2d 366 (7th Cir. 1976). And he cannot be heard to testify to that effect by way of affidavit on a motion for summary judgment. Rule 56(e), Fed.R.Civ.P. Thus, despite its consumer reaction poll gloss, Dr. Preston's affidavit is nothing more than his opinion as to the import of L–130.

For their part, defendants submit the counteraffidavit of their expert, Dr. Joseph G. Smith. Dr. Smith states that appraisal of L–130 involves the interplay of three factors—explicit content, symbolic content and consumer expectations. Smith Aff. ¶ 4. He then proceeds to dwell upon the latter—consumer expectations—culminating in the tactically astute observation that the consumer regards the likes of L–130 as "junk mail" seldom giving it any heed. *Id.* ¶ 6. As with Dr. Preston's affidavit, assuming the relevancy of consumer reaction in the present posture of this case, the virtue of Dr. Smith's affidavit is its candid expression of personal opinion. He then proceeds to find no explicit or implied representations which contravene the cease and desist order although the expressions "Golden Fifty formulated" and "special limited offer" and "supplies are limited" are bones in his throat. *Id.* ¶ 10.

Were plaintiff's instant motion to turn on the question of consumer reaction to L–130, the motion would be denied for clearly there would be a credibility contest between Drs. Preston and Smith. But the motion does not turn on that issue. The cease and desist order is unambiguous and so is L–130. L–130 directly represents that defendant Golden Fifty maintains a laboratory concerned with the formulation, testing and performance of vitamin preparations. There is no other construction which can be given to the following excerpts from L–130:

(From the cover)

LISTEN FOLKS—
* * * read inside about the new famous GOLDEN-50 FORMULATED helpful, powerful VITAMINS C and E!

* * * * * * *

ANNOUNCING

"DISCOVERY 72"
SEE EXCITING DETAILS
(in an arrow pointing to the first page inside upon which appears—)
Two men working in a laboratory beneath which appears
THE GOLDEN-50 "Discovery '72" formulation is a valuable "nutrition extra" * * * we proudly describe inside as "DISCOVERY '72"

* * * * * * *

Then "inside" the following appears
Presenting "Discovery '72"—GOLDEN-50's New Vitamins C and E.

* * * * * * *

[a testimonial]
. . . Thank your chemist and whomever concocted the pleasant way to take vitamins

* * * * * * *

Famous Golden-50 Ten Hour Features

* * * * * * *

You receive the newest products of vitamin science research, always improved, always formulated for best health and peace of mind
And finally on the back cover—
* * * The product is formulated to strictest purity and quality standards * * *

[3,4] True, these representations are obscured among other exhortations regarding the virtues of vitamin taking and, as Dr. Smith urges, the consumer may approach Golden Fifty's self-aggrandizement with "modest skepticism, and characteristically, less than modest interest." Smith Aff. ¶ 6. But under ¶ 1(a) of the cease and desist order, defendants have, by agreement, been enjoined from making representations the likes of these and that injunction will be honored, regardless of whether the consumer is taken in by the representations.

The same is equally true of the prohibitions of ¶ 1(d) of the cease and desist order. L–130 states unequivocally that Golden Fifty is making a "Special Limited Offer"; that the recipient is receiving a "Special Notice"; that "Supplies are limited"; indeed, that the offer is at "low 'insider's prices.' " Clearly those are representations that the offer is for a limited period of time which defendants agreed not to make when no such limitations are imposed by defendants.[1]

[5,6] We have concluded that the violations here are in all essential respects akin to those in the cases relied upon by plaintiff and that there is no contested material issue of fact as to the violations. In *United States* v. *Rushing*, 1973–2 CCH Trade Cases ¶ 74,631

[1] Defendants' denials in their answer are limited to the alleged representation. They do not deny that "no such limitations [were] imposed by them." Accordingly they admit the absence of limitations. Rule 8, Fed.R.Civ.P.

(E.D.La.1973), the defendant had been ordered, *inter alia*, to stop representing that he and his agents were associated with the Civil Service Commission. They did not, and the court concluded that the order was violated. In *United States* v. *Berkeley*, 1972 CCH Trade Cases ¶ 74,187 (S.D.Cal.1972), *aff'd*, 1973–2 CCH Trade Cases ¶ 74,695 (9th Cir. 1973), the defendant had been ordered to include a disclaimer in his advertisements. He did not, and the Ninth Circuit affirmed summary judgment on the issue of a violation. In *J.B. Williams*, *supra*, the defendant had been ordered not to represent that Geritol remedied tiredness unless it was caused by iron deficiency anemia, which occurs only in a minority of tiredness cases. Instead, defendants' commercials claimed that many healthy women had little or no iron reserves. The court of appeals affirmed a summary judgment on the question of defendant's violation of the order. 498 F.2d at 434. And, in *United States* v. *Piuma*, 40 F.Supp. 119 (S.D.Cal.1941), *aff'd*, 126 F.2d 601 (9th Cir. 1942), the court found defendants' substitution of the words "gland tablet" for the prohibited "gland tonic" to be an obvious violation.

Accordingly, plaintiff's motion for summary judgment on the issue of liability under Count II is granted. All that remain to be adjudicated on that count are the number of violations and the penalty to be imposed for each violation.

II. Number of Violations Represented by Charges in Counts I and III

[7,8] A determination of the appropriate number of violations depends upon the [1207] interplay of the penalty section of the statute and the language of the cease and desist order. The statute, 15 U.S.C. § 45(*l*) provides:

> (*l*) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.

The order provides in part that defendants shall cease and desist from directly or indirectly:

> Disseminating or causing the dissemination of, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which: [violates ¶¶ 1(a)–(d)].

Defendants admit that the fourteen mass mailings alleged in Count I

and the two individual mailings alleged in Count III violate the order. Plaintiff maintains that the defendants are thus liable for sixteen violations and requests summary judgment to that effect. Defendants oppose the motion, contending that the case law mandates an evidentiary hearing on the number of violations. The rule, however, is that a hearing is mandated only if the court perceives a need for more evidence on the question. *See FTC* v. *Consolidated Foods Corp.*, 396 F.Supp. 1353, 1356 (S.D.N.Y.1975). Here, defendants having admitted the fourteen mass mailings charged in Count I and the two individual mailings charged in Count III, the only remaining issue is one of law: whether these incidents constitute sixteen or fewer violations.

Earlier cases offer little concrete guidance on the appropriate number of violations to be charged when an advertisement is disseminated through a mass mailing. Generally, the courts have accepted the FTC's breakdown with little comment. *E.g., J. B. Williams, supra*, 498 F.2d at 420–421; *United States* v. *Ancorp National Services, Inc.*, 367 F.Supp. 1221 (S.D.N.Y.1973); *aff'd*, 516 F.2d 198 (2d Cir. 1975). A plausible explanation for the dearth of authority is that the FTC's estimates have been reasonable, if not conservative. For example, in *United States* v. *Wilson Chemical Co., Inc.*, 1962 CCH Trade Cases ¶ 70,478 (W.D.Pa.1962), *aff'd*, 319 F.2d 133 (3d Cir. 1963)(mem.), the court found that defendants' advertisement appeared in approximately 25,000,000 comic books. The Government, however, grouped the violations into nine categories depending upon the publisher and the month of publication. The court imposed the maximum penalty upon each of the nine violations, noting in dicta that each individual comic book which reached a customer could be considered a separate violation.

Without straining, we could read the statute and order here to similar effect. The statute provides that *each violation* of a cease and desist order is a separate offense. The order prohibits defendants from mailing or causing to be mailed *any advertisement* which contains a proscribed representation. If defendants had mailed a single advertisement in Count I, we would have little trouble finding a violation. The fact that they mailed millions rather than one or two, as in Count III, does not diminish the seriousness of each individual violation. The Government's charitable grouping of the violations in Count I by date and mailing service is more than reasonable.

Accordingly, we find that the proper number of violations attributable to the conduct charged in Count I is fourteen. Moreover, each of the two individual violations alleged in Count III is properly chargeable as a separate violation of the cease and desist order. The plaintiff's motion for summary judgment on the issue of [1208] the number of violations represented in Counts I and III is granted. An

order will enter holding the defendants liable for sixteen violations of the cease and desist order entered in the Federal Trade Commission proceedings bearing docket No. 8792. The amount of penalty to be assessed for each violation remains to be adjudicated.

An order in accord with all of the foregoing has been entered.

KENNECOTT COPPER CORP. v. FEDERAL TRADE COMMISSION*

Nos. 71–1371 and 75–1699. F.T.C. Docket No. 8765.

(United States Court of Appeals, Tenth Circuit, October 18, 1976)

On motion for contempt of court resulting from firm's failure to divest itself of an acquisition held to be in violation of law by F.T.C., and affirmed by the court, court determined to hold the contempt proceeding in abeyance pending the completion of the divestiture. Court felt that "compliance is more important than punishment."

Before Honorable DELMAS C. HILL, Honorable OLIVER SETH, Honorable WILLIAM J. HOLLOWAY, JR., Honorable ROBERT H. MCWILLIAMS, Honorable JAMES E. BARRETT, and Honorable WILLIAM E. DOYLE, *Circuit Judges.*

The Federal Trade Commission has petitioned this Court seeking an order citing Kennecott Copper Corporation for contempt of Court as a result of its failure to comply with the judgment of this Court entered September 15, 1972, affirming and enforcing the Commission's order of May 5, 1971, which required Kennecott to divest itself of the Peabody Coal Company, its acquisition of which was held to have been invalid. Various charges and countercharges have been received pertaining to this issue and the matter now stands submitted.

We have concluded that the present time is not in the best interest of the implementation and execution of the final judgment for this Court to pursue this collateral issue.

Accordingly, it is ordered as follows:

That this Court shall retain jurisdiction of the contempt citation, but shall hold this matter in abeyance.

The cause, with the exception of the contempt proceeding, should be and it is hereby remanded to the Federal Trade Commission with directions to that body to proceed at once with the direct object of the proceedings, namely the divestiture.

The Federal Trade Commission shall report to this Court within 90 days following the remand of this cause the progress which has been realized. It shall thereafter report to this Court at 90 day intervals as to the progress which has been realized.

Pursuit of the contempt proceeding contemporaneously with the efforts to bring about divestiture of Peabody Coal Company appears to the Court to constitute efforts which are at odds one with the other.

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* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶61,162 at 70,244 (1976-2 Trade Cases). For case before the Commission, see 78 F.T.C. 744.

Compliance is more important than punishment and we question the value of pursuing a course of action which will impede it.

The Honorable David T. Lewis, Chief Judge, did not participate.

THRIFTY DRUG STORES CO., INC. v. FEDERAL TRADE COMMISSION*

Civ. A. No. 76-2013. F.T.C. File No. 99-334.

(United States District Court for the District of Columbia, October 29, 1976)

In a "reverse" Freedom of Information Act proceeding seeking to restrain the F.T.C. from releasing documents tendered by plaintiffs during a non-public investigation, court held that the immediate irreparable harm disclosure of the information would cause the corporation's competitive position would make the action moot, whereas the agency and party requesting the information would not be prejudiced or instantly injured by a delay in the release of the documents. Temporary restraining order granted.

Richard C. Warmer, Washington, D.C., for plaintiff.

Before GREEN, *District Judge*.

ORDER

This action is before the Court on a so-called reverse Freedom of Information Act case in which plaintiff, Thrifty Drug Stores Co., Inc. (hereinafter Thrifty), seeks to enjoin the Federal Trade Commission from releasing documents, pursuant to a Freedom of Information Act request, which were submitted by plaintiff to the Commission in connection with a non-public investigation of Thrifty. Oral argument on plaintiff's motion for a temporary restraining order was heard before the Court on October 29, 1976.

By letter dated October 14, 1976, the Commission informed Thrifty that the following documents contained in Thrifty's investigatory file were determined not to fall within 5 U. S. C. 552(b)(4) and would be released at 5:00 p.m. on October 29, 1976:

(1) Thrifty's Statement of Purchases;

(2) Thrifty's Purchase Orders and Invoices;

(3) Buyer's ReCap—Purchase Orders and Warehouse Purchase v. Budget Forms that are at least five years old;

(4) Listings of the consideration received by Thrifty from Suppliers for participation in the volume promotion program of 1970–1973;

(5) Portions of the hearing transcripts that do not discuss subject matters which the Commission considers confidential; and

(6) Miscellaneous documents that do not contain competitively harmful commercial information.

Plaintiff asserts that the documents to be released encompass confidential commercial and financial information concerning Thrifty's costs, purchases, sales and profit margins and that disclosure of the

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶61,133 at 70,126 (1976-2 Trade Cases).

information will cause substantial harm to Thrifty's competitive position. Consequently, it is argued that the material is exempt from disclosure under the Freedom of Information Act, 5 U. S. C. 552(b)(4), and prohibited from disclosure by 18 U. S. C. 1905, and that agency action to the contrary is an abuse of discretion and in violation of the law. An affidavit of the Senior Vice President of Thrifty, accompanying plaintiff's motion for a temporary restraining order, supports plaintiff's position that the first four of the six categories listed above may well fall within the confidential information exemption of the Freedom of Information Act, 5 U. S. C. 552(b)(4). As to the last two categories, plaintiff indicates that material within those categories could, if released, pose a threat to its competitive position, but that it cannot determine such for a fact because plaintiff has been unable to ascertain which specific section of the documents referred to in the last two categories would be released.

It is clear that once the documents are released, the action will be moot and that irreparable injury will befall the plaintiff. Furthermore, delay will not prejudice or cause immediate injury to either the Commission or the individual who requested the documents under the Freedom of Information Act.

It is therefore concluded that plaintiff has met the threshold elements justifying the issuance of a temporary injunction. See *Virginia Petroleum Jobbers Ass'n* v. *Federal Power Commission*, 259 F.2d 921 (D. C. Cir. 1958).

The United States Court of Appeals for the District of Columbia in *Charles River Park "A"* v. *Department of Housing and Urban Development*, 519 F.2d 935 (D. C. Cir. 1975) has directed that in cases such as the instant action, the District Court is to hold an evidentiary hearing to determine *de novo* whether the material falls within 5 U. S. C. 552(b)(4) or 18 U. S. C. 1905, and whether it is an abuse of agency discretion to release the documents. The hearing on the preliminary injunction will, therefore, follow the procedural dictates of *Charles River Park "A", supra.*

It is noted that at the oral argument, defendant's counsel waived any requirement for plaintiff's posting of a security bond.

In accordance with the foregoing, it is by the Court this 29th day of October 1976,

Ordered that plaintiff's motion for a temporary restraining order should be and the same hereby is granted; and it is further

Ordered that the defendent, its officers, agents, servants, employees and attorneys, and each person in active concert or participating with them, should be and the same hereby are restrained and enjoined from releasing any of the documents identified in numbers paragraphs 1, 2,

3, 5 and 6 of defendant's letter to plaintiff's counsel dated October 14, 1976, to wit:

(1) Thrifty's Statement of Purchases;

(2) Thrifty's Purchase Orders and Invoices;

(3) Buyer's ReCap—Purchase Orders and Warehouse Purchase v. Budget Forms that are at least five years old; . . . .

(5) Portions of the hearing transcripts that do not discuss subject matters which the Commission considers confidential;

(6) Miscellaneous documents that do not contain competitively harmful commercial information.

and it is further

Ordered that a hearing on the motion for preliminary injunction shall be held at 10:00 a.m. on Monday, November 8, 1976;

and it is further

Ordered that plaintiff shall submit papers in support of its motion for a preliminary injunction no later than 4:00 p.m. on the 3rd day of November 1976, and that the defendant shall respond thereto no later than 1:00 p.m. on the 5th day of November 1976.

FEDERAL TRADE COMMISSION v. ATLANTIC RICHFIELD CO. and THE ANACONDA CO.*

Civ. A. No. 76–777A. F.T.C. File No. 99–332.

(United States District Court, Eastern District of Virginia, Alexandria Division, November 2, 1976)

On a F.T.C. petition seeking to restrain an oil-copper-uranium merger, court held that F.T.C. had not presented clear proof that acquirer was an actual potential entrant into the copper industry, nor had it presented proof of feasible alternate entries into the currently existing industry. Entry into the uranium industry was shown to be unlikely because of the lead time and capital investment required, and those other possible entrants into the industry were of equal or better standing than the acquirer. Since acquisition is presently a sick entity, unable to compete effectively, merger would increase competition in the aluminum industry. The beneficial effect on competition, and the probability that production would be increased in the uranium industry is all to the public's benefit, and approval of the merger, rather than disapproval, is more likely. Temporary injunction was denied, but to provide an opportunity for appeal, court entered a stay of proceedings directing parties to the merger to take only such action as was easily reversible.

Before WARRINER, *District Judge.*

THE COURT: Gentlemen, thanks to your combined efforts in the adversary art of presentation of cases to the Court, I am less ignorant than I was when I announced my ignorance this morning.

You have been most helpful to the Court, and I particularly appreciate your willingness to spend all day on it and a good part of the evening on it; because on the schedule that we are required to run in order to keep a reasonable ability to have people's cases judged and decided, I have got another case starting tomorrow morning at 10 o'clock, and it is necessary that I try to complete this case, if I can reasonably do so, so I can be ready to try that one; and that's the reason that we are running to 10 o'clock tonight.

The Court, having considered particularly in its reading of the matters that have been filed, the position and affidavits and the briefs filed by the Government, and having paid particular attention to what the Government has attempted to show, and has had an opportunity to pay less attention to what Arco and Anaconda have shown by their affidavits, other than what they have specifically pointed out to me, is in a position to be able to render an opinion now better than it would be 24 hours from now or 48 hours from now.

All of you have had a full and complete opportunity to present your case. No one has been limited in any way, so far as the Court knows, in

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶61,144 at 70,162 (1976–2 Trade Cases).

telling the Court what you believe is material, pertinent, significant, in matters to be considered by the Court in reaching its decision.

Having listened to you, having heard, and I believe understood your position on the law, each of you, the Court now finds, first, that the Government has no proof under the law that Arco is an actual potential entrant into the copper industry, or into the industry in which Anaconda is now engaged.

The Government has no proof that there are feasible alternative entries into the industry as it presently exists.

I should say that the Government has shown that there are some unlikely entrants into that field, and that among those unlikely entrants some are attempting to enter the field; but the Government in a sense had a problem.

They found themselves on both horns of the dilemma. In order to prove that the industry was concentrated, and that it was not one that people could slip in and out in the twinkling of an eye, they proved that it is extremely, severely difficult for an industry (sic) to enter the field.

Having done that, I think that the Court must conclude that that is correct; that it is not likely that anybody would enter the field in view of the obstacles that Dr. Leaming says are in the way of success, but businessmen have a way of doing unlikely things, and some businessmen are entering the field nonetheless, and some of them may be successful.

But under the criteria which I understand the law to lay down for feasible alternative entry, there are no feasible alternative means of entry.

Such proof as the Government has as to the effect on the market, the proof shows that there is a reasonable likelihood of more, not less, competition, if the merger takes place.

Anaconda under the evidence may not be sick unto death, but the Court recognizes that a company that has had two-thirds of its productive capacity taken from it within the past five years, with scant compensation for that divestiture, must be a sick corporate entity, and the evidence is that it is a sick corporate entity.

Now I mention this not in weighing any equities that have to do with the corporate well-being of Anaconda for Anaconda's sake, or for the sake of the pocketbooks of Anaconda's stockholders or the pocketbooks of Anaconda's employees as employees but only in that those people may be affected just as the general public is affected in the fields in which Anaconda is engaged, when Anaconda is unable efficiently, and effectively, and vigorously to compete in the industry.

I think the evidence is that they are unable efficiently, and effectively, and vigorously to compete.

The Court finds as is, I think, admitted by all parties, that this

merger will have a beneficial effect to the public in the field of aluminum competition. That is not an inconsequential factor in figuring what are the public benefits derived from the merger.

The Court still doesn't understand why the Government utterly failed to even mention that in its opening; but that's neither here nor there. The Government does admit that aluminum competition will be enhanced, and that is not small factor in determining whether the public good is advanced by the merger.

Uranium, I think, presents something more than a run-of-the-mill analysis as to what the public interest may be. Uranium production is crucial to the well-being of this country over the next several decades, and the ability, the increased ability, for relatively early increases in the production of uranium is of paramount interest to the public.

The Court finds that relatively early increase in the production of uranium is a probable result of this merger.

The Court finds on the evidence that the lead time and the capital investment in the industry is such that, as I have already said, any entry is unlikely, but such potential entry as has been shown among the petroleum industry, the foreign copper mining industry, other mining industry, for example,—again quoting, I believe, Dr. Leaming—does not exclude a substantial number of possible entrants of equal standing with Arco, perhaps some with better potential than Arco, and I believe that the Government admits that it is their duty to exclude a substantial number of likely entrants into the field.

Upon the basis of what the Government has shown today, and, as I say, in reviewing the information that has been filed, the Court has paid particular attention to what the Government has filed, and, on the basis of the information that the Government has shown, the law that the Court believes to be the applicable law, the Court believes that it is more likely that the merger will be approved than that it will be disapproved.

In view of the peculiar economic facts which face the industry affected, as has been shown by the evidence before the Court, the peculiar economic facts with which the oil industry is faced, with which the copper and aluminum industry is faced, the uranium industry is faced, the Court concludes from the showing made here that the public interest will be promoted by the merger rather than there being any detriment to the public interest.

The Court believes that competition in the industry affected will be increased by the merger rather than decreased by the merger; and all of these things the Court is finding, the Court doesn't believe, knows, realizes, understands, that the Government was not put to the proof of any of these things today.

The Government was merely put to the proof of showing a case

which it had a reasonable likelihood of prevailing on, and it is on that basis that the Court has made its findings, that is that there is no proof that the Government has a reasonable likelihood of proving the various factors which the Court has gone through.

I think that Mr. Saxon is correct that it makes no difference what the people at Arco or the people at Anaconda, or anybody else, wishes the law might be; the law applies to Arco just as it applies to everyone else, though they are the fifteenth largest business in the country.

But I think it is also true that if you approach it from the other side the law applies to Arco just as it does to anyone else, even though they are the fifteenth largest industry in the country.

I think that the law with respect to the believeability of witnesses applies to Arco's executives just as it applies to the owner of the corner grocery store, if there are any more corner grocery stores, and they are to be judged on the same basis as anyone else.

If there is reason to believe that they are not telling the truth, the Court doesn't give much weight to what they say. If there's reason to believe that they are telling the truth, applying all the criteria that we give to juries when we tell the jury how to judge the credibility and the weight and the value of the witnesses, then you do believe them. And I don't have any of these people before me. I have their affidavits.

Insofar as their affidavits are contradicted, I have a counter affidavit to contradict them.

So I think it's only fair to say that, but for the expressions on the faces of the lawyers, the Court doesn't have any more ability to make any judgment as to the facts in this case than the Court of Appeals will have. They will have the same affidavits that the Court had, and the same white and the same black written on those pieces of paper.

I do not make any claim here that because I am the trial Court that I have any particular special ability to make judgments as to the credibility of the witnesses.

I simply have to make my judgment on the basis of what I have before me. I wish that I had more time, but frankly I don't believe you all could deliver yourselves of any more learning if I had given you another couple of days. You have done a very good job today.

I don't know that I could have absorbed any more learning had I spent a couple more days doing it.

You make your own judgment on what sort of job I've done today. I won't comment on that.

Mr. Sexton asked that, if the injunction does not enter, that the Court enter a stay holding the status quo for, I believe, he requested 48 hours to give the Commission an opportunity to get in contact with the Court of Appeals, and, I assume, ask the Court of Appeals for a stay pending appeal.

The Court will enter a stay against Arco and Anaconda, directing that they take none other than easily reversible action with respect to this merger for 48 hours, so that the Commission will have a reasonable opportunity to present the matter to the Court of Appeals.

Gentlemen, is there anything further remaining for Court to do?

(Whereupon, a discussion took place between Mr. Fitzgerald and the Court and Court Reporter on the transcription of the findings and conclusions.)

(Whereupon, at 10:15 p.m., the hearing in the above-captioned matter was concluded.)

HORIZON CORP. v. FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 76-2031 F.T.C. Docket No. 9017.

(United States District Court, District of Columbia, November 18, 1976)

On petition for injunction to prevent Administrative Law Judge from turning over certain documents to F.T.C. counsel, court held that plaintiff was entitled to the return of the documents since submission of the documents to the ALJ for *in camera* review under a claim of privilege did not constitute "compliance" with the F.T.C. subpoena, and the ALJ's intention to relinquish the documents he deemed to be unprivileged to complaint counsel was, in effect, an illegal F.T.C. enforcement of its own subpoena. Injunction granted.

Glenn Mitchell, Washington, D.C., for plaintiff.
Tobey Kaczensky, Washington, D.C., for defendant.
Before GASCH, *Judge*.

Memorandum

This action arises under the Federal Trade Commission Act, 15 U. S. C. §§ 41 *et seq.*, the Administrative Procedure Act, 5 U. S. C. §§ 551 *et seq.*, and the Fifth Amendment to the Constitution. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1331, 1337 and 5 U. S. C. §§ 701 *et seq.*, and is challenged by defendants.

Plaintiff Horizon Corporation is a Delaware corporation with its principal place of business in Arizona; it engages in the sale of developed and undeveloped land in that latter state, Texas, and in New Mexico. Since 1971, it has been the subject of a Federal Trade Commission ("Commission") investigation of its promotional activities and sales practices. On November 2, 1976, it brought this action for emergency injunctive relief, seeking to temporarily restrain F. T. C. Assistant Chief Administrative Law Judge Earnest G. Barnes from turning over to Commission complaint counsel certain subpoenaed documents which plaintiff had submitted to him *in camera* under a claim of privilege.[1] Plaintiff has moved to preliminarily enjoin Judge Barnes from undertaking the allegedly unlawful document delivery which he has now scheduled for November 19.[2] In response, defendants have filed a motion to dismiss for lack of subject matter jurisdiction.[3] Subsequent to oral argument on these motions, the parties agreed to

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶61,155 at 70,212 (1976-2 Trade Cases).

[1] See notes 6 and 10 *infra* and accompanying text.

[2] Order dated November 5, 1976, Docket No. 9017. See note 12, *infra*.

[3] Defendants have nominally titled their motion as one for summary judgment also, although no grounds for such relief are advanced in their supporting memorandum. Because of the somewhat unique posture of this case (see note 20 *infra*), the Court fails to discern any basis, however theoretical, upon which it could grant such relief.

submit the matter to the Court for final adjudication of the merits and to treat plaintiff's motion as one for permanent injunctive relief.

For the reasons briefly set forth below, the Court finds that it has jurisdiction over this matter and that plaintiff's motion for permanent injunctive relief should be granted.

The Facts

The events giving rise to the instant controversy are not disputed by the parties. Early in 1971, the Commission commenced an investigation of plaintiff's advertising and real estate sales practices. During the course of this investigation, plaintiff has over the last five years voluntarily produced in excess of 30,000 documents for Commission inspection. On March 11, 1975, the Commission issued an administrative complaint charging *inter alia*, that plaintiff had violated Section 5 of the F. T. C. Act, 15 U. S. C. § 45, by allegedly engaging in misleading and unfair advertising and sales practices.[4] On July 1, 1975, the administrative law judge handling the matter, Judge Barnes, lawfully issued a subpoena *duces tecum* at the request of Commission complaint counsel.[5] At a pretrial hearing held on May 3, 1976, Judge Barnes instructed plaintiff to submit to the Commission complaint counsel a list of all subpoenaed documents which were being withheld by plaintiff for any reason, including an assertion of privilege. At that time, Judge Barnes indicated that if the complaint counsel questioned plaintiff's stated reasons for withholding documents, he would make an "*in camera* inspection" to determine whether they were being properly withheld.[6]

By letter of June 2, plaintiff informed Commission counsel of certain documents responsive to Specification 27 of the subpoena *duces tecum* which were being withheld by plaintiff under a claim of privilege for "self-evaluative reports."[7] On June 30, Commission counsel filed a motion before Judge Barnes which reminded him of his statement at the May 3 pretrial hearing and requested that he require plaintiff to

[4] In the Matter of Horizon Corporation, Docket No. 9017.

[5] The subpoena contained 34 specifications, number 27 of which requested the following:

> "All documents which refer to or relate to or reflect: (a) all efforts by the corporation or by any shoppers' service or any independent party acting on behalf of the corporation to audit, monitor or otherwise seek to determine the extent to which the selling practices, advertisements or promotional materials used by or on behalf of the corporation in the sale of land conform to any guidelines or limitations on their use established by the corporation or by any governmental body; (b) all responses and actions by the corporation which pertain to such efforts."

Complaint Exhibit A at 15.

[6] Tr. at 134, Complaint Exhibit B.

[7] It should be noted at the outset that the merits of plaintiff's privilege claim are not before this Court for purposes of the instant proceeding. The only substantive legal question here presented concerns the lawfulness of Judge Barnes planned delivery of the controverted documents. The Court does not reach the merits of plaintiff's claim of privilege for "self-evaluative" reports.

Plaintiff also required for *in camera* inspection several documents responsive to Specification 28 under an assertion of attorney-client privilege. See note 9 *infra*.

accordingly submit all withheld documents to him for an *in camera* ruling on the privilege claimed.[8] By apparent agreement of the parties, this was done.

By an order dated August 10, Judge Barnes denied plaintiff's claim of privilege for the documents here at issue[9] and stated his intention to deliver these documents directly to complaint counsel within ten days.[10] After granting a brief extension of this deadline, Judge Barnes on August 27 certified his order for administrative review by the Commission.

On October 5, the Commission issued an order affirming Judge Barnes' denial of plaintiff's privilege claim. (Complaint Exhibit E). Plaintiff then moved, on October 26, for the return of its documents. Two days later, by order dated October 28, Judge Barnes denied plaintiff's motion and stated his intention to turn the documents over to complaint counsel on November 2 unless he were restrained from so doing by a federal court. Plaintiff then filed an administrative motion for a stay of that order and an application for interlocutory appeal.

On November 5, Judge Barnes denied both of plaintiff's requests[11] and established a final deadline date of November 19,[12] it appears that unless he is restrained by this Court, Judge Barnes will deliver the documents in question to Commission complaint counsel on that date.

The Merits

The gravamen of plaintiff's complaint is its contention that Judge Barnes' planned document delivery would constitute an unlawful "enforcement" of a Commission subpoena. Plaintiff correctly points to the fact that Congress has specifically declined to vest the Commission with the power to enforce its subpoenas administratively. Instead, Section 9 of the F. T. C. Act, 15 U. S. C. § 49, provides that the

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[8] See Commission complaint counsel's "Motion to Require Respondent to Produce Certain Documents to the Law Judge for *In Camera* Inspection and to Require Respondent to Produce All Subpoenaed, Nonprivileged Documents to Complaint Counsel" at 1-2, Exhibit A to plaintiff's reply brief.

[9] Judge Barnes did, however, uphold plaintiff's claim of attorney-client privilege as to several withheld documents responsive to Specification 28 of the Commission's subpoena. He of course immediately returned these documents to plaintiff. Judge Barnes also returned to plaintiff one Specification 27 document for which the "self-evaluative report" privilege was claimed, but stated that he was doing so only because of the document's "doubtful relevancy," not because he found it privileged as claimed. Order dated August 10, 1976 at 6-7, Complaint Exhibit D.

[10] Judge Barnes' order reads as follows:

> "Actual delivery of the documents to complaint counsel will be delayed in accordance with respondent's request to enable respondent to take further legal steps, by way of appeal or court action, to sustain its claim of privilege. Respondent will be given ten (10) days from service of this order in which to take whatever further action respondent deems necessary in light of this order."

Order dated August 10, 1976 at 7, Complaint Exhibit D.

[11] It appears that although the instant action was filed on November 2, it was not finally ripe for review by this Court until such time that Judge Barnes denied plaintiff's motion for administrative relief on November 5.

[12] Order dated November 5 at 1, Exhibit D to defendants' opposition brief. Judge Barnes extended his deadline date to November 19 presumably to afford this Court the opportunity to hear and decide this matter after it had been fully briefed.

Commission may enforce its subpoenas only through resort to the federal courts.[13] It is well-settled that such an enforcement proceeding brought in a district court, at which the non-complying party is entitled to raise all substantive objections to the Commission's subpoena, is the exclusive mechanism available to the Commission when it is faced with non-compliance. See, e.g., *F. T. C.* v. *Claire Furnace Co.*, 274 U. S. 160, 173–74 (1927); *United States* v. *Feaster*, 376 F.2d 147, 149 (5th Cir. 1967); *Eclipse Sleep Products of New England, Inc.* v. *F. T. C.*, 1962 CCH Trade Cases ¶ 70,480 (D. Mass. 1962). It is for this reason that the federal courts generally have no jurisdiction to grant pre-enforcement review of a Commission subpoena; they know that the subpoenaed party is in absolutely no jeopardy unless and until the Commission pursues this remedy in federal court. See *St. Regis Paper Co.* v. *United States* 368 U. S. 208, 226 (1961); *Anheuser-Busch, Inc.*, v. *F. T. C.*, 359 F.2d 487, 490 (8th Cir. 1965). Plaintiff therefore argues that the document delivery planned by Judge Barnes would violate the clear prohibition of Congress and thereby unlawfully deny plaintiff its statutory right to litigate its privilege claim, if the Commission insists, in a federal court.

In response, defendants do not quarrel with plaintiff's presentation of the law. Rather, they rest their case upon their view that Judge Barnes' conduct will not constitute an unlawful enforcement of their subpoena because plaintiff has "already complied with the subpoena by delivering the documents in question to the ALJ for *in camera* review." (Defendants' Memorandum at 4). They point to the fact that plaintiff submitted the documents to Judge Barnes without any reservation or objection to the Commission's subpoena and further contend that plaintiff had the "expectation" that the documents would be delivered to complaint counsel if they were found to be not privileged. As purported support for this view, defendants rely only upon the perceptions of Judge Barnes as stated in his November 5 order denying further administrative appeal of this matter, wherein he concludes that it was "implicit in [his] earlier rulings" that the "documents in question would be made available to complaint counsel."[14]

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[13] The statute provides:

"• • • And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. • • •"

15 U. S. C. § 49; see also 15 U. S. C. § 50.

[14] Order dated November 5, 1976 at 3, Exhibit D to defendants' opposition brief. Judge Barnes described his position as follows:

"At a later date the documents for which a privilege was claimed were turned over to the undersigned for *in camera* examination for the purpose of determining whether the claimed privilege was appropriate. At no time did respondent challenge the lawfulness of the Commission's subpoena; nor was it ever indicated in any manner that respondent did not intend to fully comply with the subpoena and with rulings which the undersigned might make in respect thereto. No reservation of any kind was ever asserted, and there was no understanding at any time that documents, relevant to the subpoena and found not to be privileged from

(Continued)

In its reply brief and at oral argument, plaintiff has forcefully—and, the Court believes, effectively—undermined this "compliance" premise vital to the defendants' position. Plaintiff correctly points out that it was in response to the complaint counsel's motion that it submitted the controverted documents to Judge Barnes, a pleading with the revealing title of "Motion to Require Respondent to Produce Certain Documents to the Law Judge for In Camera Inspection and to Require Respondent to Produce All Subpoenaed, Nonprivileged Documents to Complaint Counsel."[15] Even more significantly, plaintiff draws the Court's attention to the transcript of the May 3 pretrial hearing at which Judge Barnes stated the following:

> He [counsel for plaintiff Horizon] should make a listing for complaint counsel of every document that he has determined he is withholding, every document which is responsive to the subpoena, and he has made a determination to withhold it on the ground of privilege or whatever, he is to make a list of the documents and state his reason for withholding the documents, and he should give you the listing and if you have any problems with it, then we can *take it up at a* compliance hearing. The proper procedure would *be for him to produce them if there is a controversy for my in camera inspection.*

Transcript of the May 3, 1976 pretrial hearing at 133–34, Complaint Exhibit B (emphasis added). Plaintiff argues that this Court can come to no other conclusion but that the procedure properly contemplated by both Judge Barnes and complaint counsel was a "two-step process" whereby the documents would first be submitted to Judge Barnes to facilitate his decision on the merits of plaintiff's asserted privilege and in the event of a ruling adverse to the privilege claim would then be returned to plaintiff for delivery to complaint counsel (*i.e.*, compliance with the subpoena).

The Court finds that, with due deference to the position taken by Judge Barnes in his order of November 5, it has no sufficient basis to conclude otherwise. Certainly, the submission of subpoenaed documents to an administrative law judge to facilitate his ruling on a claim of privilege cannot be an uncommon practice at the Federal Trade

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discovery, would not be turned over to complaint counsel. . . ."

Implicit in the earlier rulings of the undersigned and the Commission respecting respondent's claim of privilege was the understanding that the documents in question would be made available to complaint counsel.

Id. at 2-3 (emphasis added).

[15] Exhibit A to plaintiff's reply brief. Plaintiff points out that there is no indication on the record, aside from the perceptions offered by Judge Barnes in his orders, that any party expected Judge Barnes to undertake a direct document delivery upon ruling adversely to plaintiff's privilege claim. Certainly it would appear from all available indications that Commission complaint counsel did not view plaintiff's document submission as a binding "compliance" with the subpoena. In complaint counsel's above-mentioned motion, for example, it expressly moved that the controverted documents "be submitted to the Law Judge for his *in camera* inspection to determine *whether such documents should be produced to complaint counsel.*" *Id.* at 1 (emphasis added). Such phrasing, unrebutted by evidence of any complaint counsel understanding to the contrary, is logically read to belie any possibility that its authors believed plaintiff's submission to be an unreserved compliance without any residual rights to have the documents returned upon an adverse ruling and for plaintiff to *then* decide whether the documents would be "produced to complaint counsel."

Commission; indeed, Judge Barnes himself required it in this case as the "proper procedure."[16] Yet defendants have curiously failed both in their pleadings and at oral argument to advise this Court of a *single* other instance in which an administrative law judge at the Federal Trade Commission—or for that matter at any other comparable administrative agency—has undertaken the course of action planned by Judge Barnes under similar, or even analogous, circumstances to those presented here. Moreover, defendants failed to advance any basis in law or in F. T. C. practice for their bald assertion that plaintiff's document submission to Judge Barnes constituted "compliance" with his subpoena as opposed to a conditional submission for the sole purpose of facilitating Judge Barnes' substantive determination.[17] In fact, when pressed on this point at the oral argument, defendants' counsel could only offer the consensus admission that the Commission's standard operating procedure regarding subpoenas is a "trifle sloppy," in that the Commission's subpoenas *duces tecum* require production of the requested documents before the appropriate administrative law judge, but "really mean" that the documents are to be delivered by the subpoenaed party to complaint counsel.[18]

Hence, this Court cannot conclude that plaintiff's document submission to Judge Barnes constituted "compliance" with the subpoena and therefore can view Judge Barnes' planned document delivery in no other way but as the prospective unlawful enforcement of that subpoena. Accordingly, the Court finds that plaintiff has stated a claim and requested relief properly within the subject matter jurisdiction of this Court,[19] and that defendants' motion to dismiss for

[16] Transcript of the May 3, 1976 pretrial hearing at 134, Complaint Exhibit B.

[17] As reproduced at note 14 *supra*, Judge Barnes' November 5 order goes to great lengths to stress that plaintiff seemingly neglected to either "challenge the lawfulness of the Commission's subpoena" or to make a "reservation of any kind" prior to submitting the documents to him. Order dated November 5 at 3, Exhibit D to defendants' opposition brief. As described *supra*, defendants' case rests exclusively upon this argument and upon their necessary "compliance" conclusion. Yet defendants have not asserted to the Court either the existence of any formal "challenge" or "reservation" mechanisms available to respondents before the Commission, or even an instance illustrating the exercise of any comparable informal mechanisms in the past.

[18] See note 15 *supra* and accompanying text. The subpoena nowhere specifies the party to whom the requested documents are to be delivered; it merely compels the attendance of plaintiff's named corporate officer, President Sidney Nelson, at a Commission hearing before Judge Barnes and requires that he "produce at said time" the documents specified therein. Complaint Exhibit A. Its instruction is thus sufficiently ambiguous to be in accord with plaintiff's position—and defendants' admission—as to its true meaning.

[19] In defendants' motion to dismiss for lack of subject matter jurisdiction in this case, they pose what would under ordinary circumstances be a most logical threshold consideration for the Court's determination. Defendants first properly advance the general rule that the courts should not intervene in a pending administrative proceeding except under extraordinary circumstances. See *e.g.*, *Renegotiation Board* v. *Bannercraft Clothing Company, Inc.*, 415 U. S. 1, 20–22 (1974). They next cite to sections 5(c) and (d) of the F. T. C. Act, 15 U. S. C. §§ 45(c) and (d), and section 10(c) of the Administrative Procedure Act, 5 U. S. C. § 704, for the general proposition that an administrative ruling in an F. T. C. proceeding is subject to judicial review only upon the issuance of any final cease-and-desist order and then only by the Court of Appeals. Defendants ground their position that these rules should control here upon their hopeful assertion that "Horizon has presented no circumstances warranting a departure" from them in this case. (Defendants' opposition memorandum at 3). As has been amply demonstrated, however, this case presents the prospect of an unlawful enforcement of a Commission subpoena, a violation of "express statutory conditions," and is therefore sufficiently extraordinary to mandate the equity jurisdiction of this Court. *Elmo Division of Drive-X Company, Inc.* v.

(Continued)

lack of such jurisdiction should be denied.[20] The Court finds further that the criteria for injunctive relief are met,[21] and that plaintiff is entitled to an injunction ordering the return of its documents.

It should be noted in this connection that the grant of such relief in no way injures defendants or precludes Judge Barnes from a course of conduct not otherwise expressly prohibited by statute. Rather, it merely relegates the Commission to the position it would ordinarily occupy when facing prospective noncompliance with one of its subpoenas; should plaintiff upon return of its documents refuse to surrender them as compelled by the subpoena, the Commission may then choose to properly enforce its subpoena in the federal district court. It is only in that way that plaintiff's statutory right to litigate the merits of its privilege in an enforcement proceeding can be preserved, not to mention plaintiff's ultimate constitutional right to face the consequence of contempt in disobedience to a lawful court order requiring that it surrender documents within its control.

Dixon 348 F.2d 342, 345 (D. C. Cir. 1965). See *Sterling Drug, Inc.* v. *Federal Trade Commission* 450 F.2d 698, 710 (D. C. Cir. 1971); *Macy & Company, Inc.* v. *Tinley*, 249 F. Supp. 778, 782 (D. D. C. 1966); *cf. A. O. Smith Corp.* v. *Federal Trade Commission* 530 F.2d 515, 521 (3d Cir. 1976); *Local 130, International Union of Electrical, Radio and Machine Workers, AFL–CIO* v. *McCulloch*, 345 F.2d 90, 95 (D. C. Cir. 1965).

[20] This case presents the unusual situation in which the Court has had to determine the merits of plaintiff's claim before it could determine its own jurisdiction. Absent the Court's finding that the conduct contemplated by Judge Barnes would be unlawful, the Court would have no recourse but to dismiss plaintiff's claim for want of jurisdiction.

[21] To the extent that the criteria set forth by *Virginia Petroleum Jobbers Association* v. *Federal Power Commission*, 259 F.2d 921, 925 (D. C. Cir. 1958), are applicable to this case, the Court finds that they have been satisfied.

UNITED STATES OF AMERICA v. SAFEWAY STORES, INC.*

Civ. No. HM73-1139. F.T.C. Docket No. 7584.

(United States District Court, District of Maryland, November 19, 1976)

In granting motion for partial summary judgment to recover civil penalties, court held that it could define the meaning of the word "diet" as a matter of law, and that its use in advertisements for a new bread violated F.T.C. order relating to breads of substantially the same composition, as did advertisements emphasizing the lower caloric content, and less fattening properties of the new product. The court also held that the equal treatment defense was improper since the term "diet" as used in advertising of a competitor subject to similar proceedings, stressed only the nutritional nature of its product, rather than the weight reduction properties prohibited by the order.

Before MURRAY, *District Judge*.

MEMORANDUM AND ORDER

The question before the court is whether the recommendation of Magistrate Goetz granting plaintiff's motion for partial summary judgment and to strike defenses should be accepted. The Memorandum and Recommendation of the magistrate was filed on August 19, 1976. Defendant filed exceptions on August 31, 1976. A hearing was held before this court on November 4, 1976.

The instant suit was filed on November 20, 1973. It is an action brought by the United States, through the Federal Trade Commission (FTC), under 15 U. S. C. Section 45(l) to recover civil penalties for violations of a final order to cease and desist issued by the FTC. The order in question was issued on April 18, 1963 and became final on June 24, 1963. It arose out of the sale of "Slender-Way" bread which was advertised by Safeway as being a low-calorie bread that would prevent the consumer from gaining weight. The FTC found that the bread was not a low-calorie food and would not cause one to lose weight or prevent one from gaining weight.

The operative part of the order prohibits Safeway from advertising "in connection with the offering for sale, sale or distribution of 'Slender-Way' bread, or any other bread of substantially the same composition, whether sold under the same name or any other name"

(a) That said bread is lower in calories than other white bread;

(b) That said bread is less fattening, or is more effective in controlling body weight than other white bread.

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶61,515 at 72,005 (1976-1 Trade Cases). For case before the Commission, see 62 F.T.C. 1206.

Some background of the issuance of the order may be helpful at this point. The initial complaint was filed by the FTC against Safeway on September 16, 1959. Counsel for Safeway entered into a written agreement dated December 4, 1959, in which it was agreed that the proceeding would be held in abeyance pending the final order to be issued in another proceeding then pending before the Commission, *Bakers Franchise Corporation, et al.*, which involved substantially similar charges. The agreement also provided:

1. If there should be an excision of the trade name in that case (Bakers Franchise), then Safeway agreed to an excision of its trade name "Slender-Way";

2. If a cease and desist order should be issued against Bakers Franchise and in the event of an appeal, the order should be affirmed, Safeway would enter into an agreement containing a consent order to cease and desist on the same terms as those contained in the cease and desist order issued against Bakers Franchise; and

(3) That said agreement would be filed with the hearing examiner for his approval or rejection.

Thereafter, the FTC issued its decision in *Bakers Franchise* which included excision of the trade name of the bread involved and a cease and desist order. That decision was affirmed in *Bakers Franchise Corp.* v. *FTC*, 302 F.2d 258 (3rd Cir. 1962). In accordance with its agreement, Safeway entered into an agreement for a consent order, the terms of which are noted above.

The question herein concerns plaintiff's motion to strike defenses and for partial summary judgment. Plaintiff moved for an order striking the second, third, fourth and fifth defenses and ruling that the advertisements are within the scope of the FTC cease and desist order. As the magistrate noted in his memorandum, the substance of the defenses which the government seeks to strike are:

> 1. That a correct interpretation of Safeway's use of the word "Diet" in its advertisements for Skylark Diet Bread would result in a finding that it has not violated the terms of the 1963 Order prohibiting claims of weight reducing properties;
>
> 2. That the terms of the 1959 agreement to abide by the result of the *Bakers Franchise* litigation entitled Safeway to no less favorable treatment than Bakers Franchise, and that the Commission has allowed Bakers Franchise to use the word "Diet" in its bread advertisements;
>
> 3. That Safeway is denied due process of law because plaintiff seeks to impose greater restrictions than those specified in the 1963 Order; and
>
> 4. That Safeway had no notice or reason to believe that its use of the word "Diet" in its bread advertising would be objectionable to the Commission.

The magistrate recommended that this court grant plaintiff's motion for partial summary judgment and to strike defenses. For the

reasons below, the court will accept the recommendation of the magistrate.

I. Motion for Partial Summary Judgment

In ruling on the motion for partial summary judgment, there are two issues to be resolved:

1. Whether the new bread product is of "substantially the same composition" as Slender-Way so as to fall within the terms of the order; and

2. Whether the defendant has directly or indirectly advertised the new bread product as being lower in calories or less fattening than other white bread.

The first question is significant because the order applies to Slender-Way bread and to bread "of substantially the same composition." A threshold issue is in what manner the order is to be interpreted. Defendant cites *United States* v. *Armour*, 402 U.S. 673 (1971), for the proposition that in cases of consent orders, the four corners of the document limit its meaning, and a court cannot refer to the primary purpose of the order. Plaintiff suggests that the court consider the primary purpose of the order, which purpose, plaintiff contends, is to prevent false weight reduction claims in the advertising of bread.

Magistrate Goetz found it unnecessary to decide this issue, referring to defendant's contention and stating:

> Assuming, without deciding, that reference to the intended salutary effects of the Order would be improper, it is nevertheless clear that any fair reading of the Order itself, taken as a whole, necessarily requires that the term "substantially the same composition" be defined in light of the language of the entire order. * * *
>
> The clear import of this language is that the phrase "substantially the same composition" must be read as referring to the bread's weight control properties. Thus, any bread which is not of greater efficacy in controlling body weight would necessarily be of "substantially the same composition." (pages 3–4)

The court agrees with the magistrate's conclusion that the order is clear on its face and must be read as referring to the bread's weight control properties.

The next issue is whether the new bread is of substantially the same composition *when reference is made to the bread's weight control properties.* Safeway does not represent that the new bread (Skylark Diet Bread) has fewer calories than Slender-Way; in fact, it has more calories. Rather, defendant contends that the inclusion of L-Lysine, which increases protein content, results in a bread which is not of substantially the same composition. The court can find no fault with the magistrate's conclusion and will accept it. The magistrate concluded:

Even assuming, as this Court must, the truth of the assertion of the beneficial effects of the ingredient, the conclusion advanced by the defendant is clearly unsupportable. Were the defendant's interpretation of the operative language of the Order correct, the obvious requirements which it sets forth could be subverted by merely including new ingredients, beneficial or innocuous, which have no bearing whatever on the product's weight control properties. Such an interpretation of the Order would be absurd. Therefore, I recommend that the Court rule as a matter of law that Skylark Diet Bread is "substantially the same composition" as Slender-Way Bread. (page 4)

The court holds, accepting the recommendation of the magistrate, that as a matter of law Skylark Diet Bread is of "substantially the same composition" as Slender-Way bread.

The second question is whether the defendant directly or indirectly advertised Skylark Diet Bread as being lower in calories or less fattening than other diet breads. The plaintiff submitted sample advertisements for the court's inspection. These advertisements refer to the product simply as Skylark Diet Bread and state its price. The caloric content, weight control properties, and nutritional value of the bread are not referred to in the advertisements. As the magistrate stated:

In short, "diet" is the only word which substantially defines the bread's qualities, and no other words, symbols or pictures lend credence to a particular interpretation of the word "diet." (page 5)

There are two definitions of the word "diet" in Webster's New World Dictionary, Second College Edition, copyrighted 1970:

1. (a) what a person or animal usually eats and drinks; daily fare;
   (b) figuratively, what a person regularly reads, listens to, does, etc.
2. a regimen of special and limited food and drink, chosen or prescribed for health or to gain or lose weight—* * * to eat or cause to eat special or limited food, esp. for losing weight.

Safeway contends that the health or nutritional definition, rather than the weight loss definition, is the one applicable to Skylark Diet Bread and that, since the term "diet" is susceptible to that meaning, the court cannot rule as a matter of law that it has advertised Skylark Diet Bread in a way to indicate that it is lower in calories or less fattening than other white breads.

An important introductory issue is whether the meaning of the word "diet" as used in defendant's product is a question for the court or for the jury. Defendant contends that the question of the meaning of words in an advertisement is for the trier of facts. The magistrate concluded that the meaning of "diet" could be determined as a matter of law on plaintiff's motion for partial summary judgment. After reviewing the cases relied on by the parties, the court holds that the

magistrate correctly interpreted the applicable law and that the meaning of the word "diet" can be determined as a matter of law.

FTC v. *Sterling Drug, Inc.*, 317 F. 2d 669 (2nd Cir. 1963), was a proceeding to enjoin an aspirin manufacturer and advertising agencies from disseminating certain allegedly false and misleading advertisements. The court held that the FTC had failed to make a showing that it had reason to believe that the public would be mislead. Defendant points to that part of the opinion which states:

> Surely the fact that the word "supported" might have alternative dictionary definitions of "endorsed" or "approved" is not alone sufficient to show reason to believe that the ordinary reader will probably construe the word in this manner. Most words *do* have alternative dictionary definitions; if that in itself were a sufficient legal criterion, few advertisements would survive. (317 F.2d at 675)

Sterling Drug, however, as Magistrate Goetz pointed out, presented a different factual situation. The suit was brought under 15 U. S. C. Section 53 which requires the Commission to show that it has "reason to believe" that there is a violation of law and that an injunction would be in the public interest. No interpretation of a Commission Order was involved. In the instant proceeding, it need not be shown that the advertisement was misleading but only that it violated the order.

United States v. *Hindman*, 179 F.Supp. 926 (D. N. J. 1960), is factually closer to the instant case. That case was a proceeding by the government to recover civil penalties against defendant for violation of an order that defendant cease and desist from selling military uniforms with labels indicating the product was "custom-made." The court held that the question of whether the use of the words "custom-tailored" in the labels violated the order would have to be determined at a jury trial.

The court in *Hindman* held that a jury trial was necessary because certain special circumstances were present. The court began by noting the dictionary definition of "tailored" and concluded that "it might well seem" that "custom-tailored" would mean "custom-made."

However, the court went on to state:

> On the other hand, the defendant represents that he can prove that, as applied to military uniforms at least, "custom-tailored" means that the uniform is ready-made, but is given particularly fine stitching or other tailoring finish, which makes it a substantially different garment from ready-made military uniforms. Since the plaintiff Government did not require the defendant to verify his ability to produce evidence to that effect, it is clear that the defendant should be given the opportunity to produce such evidence, simply to show that his label representation of "custom-tailored" did not constitute a representation that the uniforms in question were "custom-made" as understood by the purchasers of such uniforms in the military service. (at page 928)

There, the defendant had evidence to present that the court thought would be relevant. In those circumstances, a dispute as to fact would

exist and summary judgment would not be appropriate. Here, the defendant has made no such proffer of evidence.

In addition, the *Hindman* decision was criticized in *United States* v. *Vulcanized Rubber and Plastics Co.*, 288 F. 2d 257 (3rd Cir. 1961). This was also an action for violation of an Order of the FTC. The court upheld the granting by the lower court of summary judgment for plaintiff, holding that defendant violated the order not to label combs as made of "hard rubber" by labeling the combs as made of "rubber resin." In footnote two, the court stated:

> Since there was no issue of fact presented, the district court properly disposed of the case on summary judgment. [The court then notes *Hindman*.] The holding was erroneous, since the sole issue before the court was whether or not the labeling practice was within the proscription of the order and not whether the labeling practice was deceptive * * * Moreover, creating an issue of fact as the court did in *Hindman*, would usurp the function exclusively vested by Congress in the Federal Trade Commission to determine the issue of whether a labeling practice is misleading or deceptive to the public. (page 258–9)

Defendant puts great emphasis on the decision in *United States* v. *J. B. Williams Co., Inc.*, 498 F. 2d 414 (2nd Cir. 1974), an action for violation of a cease and desist order. The court there was faced with the question of whether defendants had a right to a jury trial as to issues of fact and held that they did have such a right. The court did *not* hold that summary judgment was never appropriate. In fact, it affirmed the lower court's grant of summary judgment as to certain issues, holding that as to some advertisements, but not others, there existed issues of fact as to whether they violated the cease and desist order.

Having concluded that the meaning of the word "diet" can be determined by the court at this stage of the proceedings, the court further concludes that it will accept the recommendation of Magistrate Goetz that Safeway has violated the terms of the order. The court holds, therefore, that Safeway has "directly or by implication" represented that Skylark Diet Bread is "lower in calories than other white bread" or that said bread is "less fattening or is more effective in controlling body weight than other white bread." The use of the word "diet", standing alone, clearly indicates to the ordinary consumer that Skylark Bread is effective in controlling weight.

In sum, the court holds that plaintiff's motion for partial summary judgment should be granted.

II. *Motion to Strike Defenses*

The four defenses at issue have been listed at page three of this Memorandum. The first defense has been dealt with as part of plaintiff's motion for summary judgment and need not be reconsid-

ered. The final defense (lack of notice) was recommended stricken by the magistrate because the defendant did not object:

> Both plaintiff and defendant have recognized that this purported defense is material only to the issue of good faith as that bears on the damages to be assessed. * * * Therefore, the Motion to Strike should be granted as to that defense, subject to defendant's right to assert it in mitigation of damages. (page 13)

The only remaining defenses are numbers two and three above, which involve defendant's assertion that by the terms of the 1959 agreement to abide by the result of the Bakers Franchise litigation, Safeway is entitled to no less favorable treatment than Bakers Franchise, and that the Commission allowed Bakers Franchise to use the word "diet" in its bread advertisements. To be exact, Bakers Franchise was allowed to use the term "Rite-Diet" in its advertising. The words "Nutrition-Right" are superimposed over the word "Diet" in the trade-name where it appears on the loaf of bread in the advertisement. The ad also reads:

> Thinly sliced rite diet bread with an abundance of high quality protein and nutrition. Each delicious slice weighs only 17 grams. Baked without shortening. Try some today.

A memorandum dated July 2, 1962, from the Bureau of Deceptive Practices to the Commission outlines the permitted avertising in the Bakers Franchise case. The memorandum concludes:

> After careful analysis of the Commission's opinion accompanying its Findings, Conclusions and Order, it is my opinion that if it — Rite Diet Bread — is not associated with any material implying that it has any weight reducing or weight control properties and if the advertising affirmatively emphasizes nutritional qualities, respondents will be in compliance with the order. (page 2)

Clearly, there is a great deal of difference between the advertising carried on by Bakers Franchise and that undertaken by Safeway. The advertisements for Skylark Bread contain the word "diet" only, while those for Rite Diet Bread emphasize the nutritional characteristics of the bread.

Safeway relies on three cases in support of its position that it is not being given equal treatment. *Winn-Dixie Stores, Inc.*, v. *FTC*, 377 F. Supp. 773 (M. D. Fla. 1974) and *Ford Motor Co.* v. *United States*, 335 U.S. 303 (1948) are both easily distinguishable because the consent orders in those cases clearly and specifically granted the companies no less favored status than would be accorded certain of their competitors. In contrast, there is no such provision in the Safeway Order.

Ford Motor Co. v. *FTC*, No. 75–1041 (6th Cir., June 21, 1976), is also readily distinguishable. In that case, Ford had agreed to a proposed consent order with the FTC relating to its advertising practices. During the time that the proposed order was published and comments

were being accepted prior to a decision on final acceptance by the FTC, General Motors had entered into a consent order relating to its advertising with the FTC which was allegedly narrower in scope than the proposed Ford order. Ford learned of the GM order and sought to withdraw its consent or to have its proposed order modified. The FTC declined to permit Ford to withdraw its proposed consent or to modify the order. Ford then sought judicial review based upon the alleged abuse of discretion by the FTC in permitting Ford to withdraw its consent.

The court held that the FTC had failed to develop a sufficient record upon which to determine the accuracy of Ford's claims. The court further held that the FTC should not brush aside a claim without affording a hearing and making findings. The failure to do so was an abuse of discretion. The case was remanded to the FTC for further administrative findings.

The *Ford* case is not relevant to the instant situation. The factual posture of the case is entirely different, and the court's holding was specifically stated to be a narrow one.

The court agrees with the recommendation of Magistrate Goetz that the motion to strike defenses be granted as to the second and third defenses.

After reviewing the recommendations of the magistrate and the materials submitted by counsel, the court concludes that the magistrate's recommendations are well-founded and should be accepted by the court.

Accordingly, it is this 15th day of November, 1976, in the United States District Court for the District of Maryland,

Ordered:

That plaintiff's motion for partial summary judgment and to strike defenses be, and the same hereby is, Granted.

TOP VALUE MEATS, INC., et al. v. FEDERAL TRADE COMMISSION et al.*

Civ. A. Nos. 75 CV 350–W–3, 75 CV 351–W–2–3, 75 CV 352–W–4–3, 75 CV 353–W–3, 75 CV 354–W–2–3, 75 CV 355–W–3.

F.T.C. File Nos. 99–232 thru 99–237.

UNITED STATES OF AMERICA v. GUARANTEED QUALITY MEATS, INC.*

Civ. A. No. 75 CV 578–W–2–3. F.T.C. File No. 99–252.

(United States District Court, Western District of Missouri, November 27, 1976)

In action seeking preenforcement review of Federal Trade Commission Orders to File Special Report, court dismissed the complaints in each preenforcement action and granted F.T.C.'s counterclaim by ordering enforcement of the Commission's orders and payment by each plaintiff of civil penalties to the Commission.

Before WILLIAM H. BECKER, *Chief Judge*.

Plaintiffs Top Value Meats, Inc., Guaranteed Quality Meats, Inc. (hereinafter "plaintiff Guaranteed Quality Meats, Inc."), Twin City Beef Company, Prime Meats, Inc., Freezer World, Inc. and Midwestern Meat Processors, Inc. brought the first six of these seven actions seeking pre-enforcement review of Federal Trade Commission (hereinafter "FTC") orders under Section 6 of the Federal Trade Commission Act, as amended,[1] directing them to file special reports providing information about their business organizations, business methods, and

* Not otherwise reported.

[1] Section 6 of the Federal Trade Commission Act, Section 46, Title 15, United States Code, provides in pertinent part:

> The Commission shall also have power -
>
> Investigation of persons, partnerships, or corporations
>
> (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations.
>
> Reports of persons, partnerships, and corporations
>
> (b) To require, by general or special orders, persons, partnerships, and corporations, engaged in or whose business affects commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective persons, partnerships, and corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission.

advertising practices. Plaintiffs seek a declaratory judgment that the orders are invalid on several grounds, and a permanent injunction to restrain the FTC from seeking enforcement of the orders. Defendants, the FTC, the individual commissioners, and the staff attorney responsible for the investigation of plaintiffs, have counterclaimed for enforcement of the orders under Section 9 of the Federal Trade Commission Act,[2] and for the recovery of monetary penalties under Section 10 of the Federal Trade Commission Act,[3] because of the failure of each plaintiff to file a special report. In the seventh action, *United States of America* v. *Guaranteed Quality Meats, Inc.* (hereinafter "defendant Guaranteed Quality Meats, Inc."), Civil Action No. 75CV578–W–2–3, which has been consolidated with the first six actions for all further proceedings, the FTC seeks enforcement of a similar order to file a special report.

I. *Uncontroverted Facts.*

The following facts are uncontroverted.

On January 30, 1974, the FTC pursuant to Section 6 of the Federal Trade Commission Act adopted a resolution authorizing and directing the use of compulsory process in an investigation of Falcon Enterprises, Inc., Patrick Faltico, and others. The resolution stated that the purpose and scope of the investigation was

> [t]o determine whether or not Falcon Enterprises, Inc., Patrick Faltico, and others may be engaged in unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, including fictitious pricing, false and misleading advertising and deceptive selling practices, in connection with the sale of meats and other related products in various states of the United States.

On December 10, 1974, pursuant to Section 6(b) of the Federal Trade Commission Act and the resolution of January 30, 1974, the FTC issued to each plaintiff an "Order Requiring Filing of Special Report" which required each plaintiff to file with the FTC, within thirty days after receipt of the Order, a special report containing the information

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[2] Section 9 of the Federal Trade Commission Act, Section 49, Title 15, United States Code, provides in pertinent part:

> Upon the application of the Attorney General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person, partnership, or corporation to comply with the provisions of sections 41 to 46 and 47 to 58 of this title or any order of the Commission made in pursuance thereof.

[3] Section 10 of the Federal Trade Commission Act, Section 50, Title 15, United States Code, provides in pertinent part:

> If any persons, partnership, or corporation required by sections 41 to 46 and 47 to 58 of this title to file any annual or special report shall fail so to do within the time fixed by the Commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States . . . . It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures.

specified in the FTC's "Freezer Meat Firms Special Report" form attached to the Order. Whether plaintiffs were properly served with the Order will be considered in Part VI(A), *infra*. Nevertheless, the fact that none of the plaintiffs in these actions filed a special report as directed is uncontroverted.

On April 4, 1975, pursuant to Section 10 of the Federal Trade Commission Act, the FTC issued a "Notice of Default" to each plaintiff because of each plaintiff's failure to file a special report in accordance with the December 10, 1974 order. Whether plaintiffs were properly served with the notices of default will be considered in Part VI(A), *infra*.

On May 20, 1975, the plaintiffs separately filed these actions seeking to restrain the FTC from requiring plaintiffs to file the special reports as previously ordered. The FTC filed an answer and a counterclaim seeking enforcement of the orders and recovery of monetary penalties for failure to file the special reports.

Presently pending are the following motions in the original six actions:

(1) defendants' motion for consolidation of the actions;

(2) defendants' motion for summary judgment filed October 1, 1975;

(3) plaintiff Top Value Meats, Inc.'s motion to compel defendants to answer interrogatories;

(4) plaintiffs' motions to delay ruling on defendants' October 1, 1975 motion for summary judgment until after defendants respond to plaintiff Top Value Meats, Inc.'s interrogatories; and

(5) defendants' motion to dismiss and for summary judgment filed January 22, 1976.

Responses have been filed to each of these motions. On September 3, 1976, plaintiffs were directed to show cause why defendants' motion to dismiss and for summary judgment should not be granted. After being granted an extension of time, plaintiffs filed their responses on September 29, 1976.

On October 27, 1976, defendant Guaranteed Quality Meats, Inc. was directed to show cause why summary judgment should not be entered in accordance with the motion of the United States. Defendant Guaranteed Quality Meats, Inc. filed its response on November 16, 1976.

II. *Consolidation.*

Rule 42(a) of the Federal Rules of Civil Procedure provides in pertinent part that the court may order consolidation of "actions involving a common question of law or fact. . . ." Consolidation is a matter of convenience and economy in administration, and the court

has broad distinction to determine whether consolidation is desirable. *See generally:* 9 Wright & Miller, *Federal Practice and Procedure*, Section 2383 (1971 ed.); 5 *Moore's Federal Practice*, ¶42.02 (1976 ed.).

Each of these actions arises out of the same FTC investigation. Common questions of the FTC special reports are present in each action. The defenses asserted by plaintiffs are substantially identical. Consolidation is therefore appropriate in the interest of judicial economy.

Plaintiffs contend that consolidation is inappropriate on several grounds. None of the grounds is considered to be sufficient to outweigh the judicial economy which will result from consolidation.

First, plaintiffs contend that the question whether each plaintiff was properly served with the order directing the filing of a special report and the notice of default involves different factual and legal issues for each plaintiff. Although different factual and legal issues on the service question are indeed present, these issues can be separately considered for each plaintiff. See Part VI(A), *infra*. Identity of factual and legal issues is not required for consolidation.

Second, plaintiffs contend that the question whether each plaintiff is subject to the jurisdiction of the FTC presents different factual issues for each plaintiff. However, as concluded in Part VI(B), *infra*., whether plaintiffs are subject to the jurisdiction of the FTC is not an issue to be determined in the investigative stage of an FTC proceeding.

Finally, plaintiffs contend that consolidation will result in prejudice to the defendants because of possible jury confusion on the issue whether plaintiffs are liable for monetary forfeitures for failure to file special reports. However, the Federal Trade Commission Act does not provide for a jury trial on the issue of monetary forfeitures. Further, because a forfeiture action is equitable in nature, no right to a jury trial exists under the Seventh Amendment to the Constitution of the United States. *Compare: Curtis* v. *Loether*, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974); *Ross* v. *Bernhard*, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970); *Parsons* v. *Bedford*, 3 Pet. 433, 7 L.Ed. 732 (1830). Because plaintiffs are not entitled to a jury trial on the forfeiture issues, no prejudice from jury confusion will result from consolidation.

Therefore, the actions will be consolidated for purposes of all further proceedings.

III. *Defendants' First Motion For Summary Judgment filed October 1, 1975.*

On October 1, 1975, defendants moved for summary judgment on the grounds that the failure of plaintiffs to file a reply to the counterclaim seeking enforcement of the FTC orders directing plaintiffs to file special reports and recovery of monetary forfeitures constituted an

admission of all the allegations of the counterclaim. On October 9, 1975, plaintiffs moved for leave to file a reply to defendants' counterclaim, and the requested leave was granted on November 7, 1975.

By filing a reply to defendants' counterclaim, plaintiffs have placed in issue the allegations of the counterclaim. Therefore, defendants' October 1, 1975 motion for summary judgment will be denied without prejudice as moot.

IV. *Discovery Motions.*

Plaintiff Top Value Meats, Inc. served twenty-one interrogatories on defendants, several containing requests for additional information in subparagraphs. After being granted an extension of time to respond to the interrogatories, defendants filed a response objecting to the first nineteen interrogatories in their entirety, objecting to interrogatory number 20 in part, and responding to the remainder of interrogatory number 20, and to interrogatory number 21 in full. Plaintiff has moved to compel defendants to answer the interrogatories to which objections were made, and all plaintiffs have moved to delay a ruling on defendants' motion for summary judgment until answers to the interrogatories are filed. Because plaintiff has failed to show good cause for authorization of discovery of the requested information, both motions will be denied.

An action to enforce an administrative subpoena is a summary proceeding. *Equal Employment Opportunity Commission* v. *Quick Shop Markets*, 526 F.2d 802 (8th Cir. 1975); *United States* v. *Davey*, 426 F.2d 842 (2nd Cir. 1970). Although the Federal Rules of Civil Procedure apply to such actions, applicability of the Federal Rules may be limited by the district court. Rule 81(a)(3) of the Federal Rules of Civil Procedure. *Donaldson* v. *United States*, 400 U.S. 517, 528–529, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971).

Because of the public interest in expeditious determination of the validity of administrative investigatory subpoenas, the party contesting the subpoena is not entitled to discovery as a matter of right in an enforcement proceeding.[4] *United States* v. *Litton Industries, Inc.*, 462 F.2d 14 (9th Cir. 1972); *Genuine Parts Company* v. *F.T.C.*, 445 F.2d 1382 (5th Cir. 1971). Whether to permit discovery is discretionary with the district court. *F.T.C.* v. *Browning*, 435 F.2d 96 (D.C. Cir. 1970). *Cf: United States* v. *Roundtree* 420 F.2d 845, 851–852 (5th Cir. 1969).

If the discovery requested is only relevant to legally insufficient grounds for contesting the subpoena, then the district court may properly exercise its discretion to deny the requested discovery. *F.T.C.*

[4] The same rule is applicable to actions seeking pre-enforcement review of an FTC order directing the filing of a special report. *Genuine Parts Company* v. *F.T.C.*, 445 F.2d 1382 (5th Cir. 1971).

v. *Browning, supra.* Further, to avoid unjustified delay in determination of the merits, the party seeking discovery "must raise in a substantial way the existence of substantial deficiencies in the summons proceeding [before discovery will be permitted]." *United States* v. *Newman,* 441 F.2d 165, 169 (5th Cir. 1971). See also: *United States* v. *Roundtree, supra; F.T.C.* v. *Page,* 378 F.Supp. 1052 (N.D.Ga. 1972). *Cf: F.T.C.* v. *Kujawaski,* 298 F.Supp. 1288 (N.D.Ga. 1969). Plaintiff has failed to show good cause for its discovery requests on both of these grounds.

First, in regard to interrogatories numbers 1, 4, 5–7, 9–19, and the unanswered portion of 20, the discovery requests seek information which is clearly irrelevant to the issues to be determined in a proceeding to enforce an administrative investigative subpoena. The only issues to be determined in such a proceeding are: (1) whether the inquiry is one the agency is authorized by law to make; (2) whether the information requested is reasonably relevant to the inquiry; and (3) whether the disclosures sought are "reasonable", i.e., not overbroad, indefinite, or unduly burdensome. *United States* v. *Powell,* 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964); *United States* v. *Morton Salt Co.,* 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950); *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946). *See* Part VI, *infra.* Information concerning F.T.C. employees and informants active in the investigation (numbers 1, 4, 16, 17, 18 and in part, 20), information concerning deferral of jurisdiction over plaintiff to the FTC by the Department of Agriculture (numbers 5–7), information about other freezer meat firms included in the investigation (numbers 10–15), and information about economic studies and preliminary findings by the FTC (numbers 9 and 19) is clearly irrelevant to the validity of the order directing plaintiff to file a special report.

Second, in regard to interrogatories numbers 2, 3, and 8, plaintiff has failed to make the preliminary showing required before such discovery requests will be granted. Each of these interrogatories seek information concerning exchange of information between the FTC, the Federal Bureau of Investigation, the Department of Justice, and other governmental agencies. An administrative subpoena issued for the sole purpose of gathering data for a pending criminal charge, or solely for criminal purposes, is issued for an improper purpose and will not be enforced. *Donaldson* v. *United States,* 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 5802 (1964). *See also: United States* v. *Bisceglia,* 420 U.S. 141, 95 S.Ct. 915, 43 L.Ed.2d 88 (1975); *United States* v. *Powell,* 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964). However, the burden is on the summoned party to show that the subpoena is used for an improper purpose. *United States* v. *Powell, supra; F.T.C.* v. *MacArthur,* 532 F.2d

1135, 1141 (7th Cir. 1976); *United States* v. *Fisher*, 500 F.2d 683, 687 (3rd Cir. 1974) (en banc). Plaintiff has failed to make the substantial showing that the special reports will be used by the FTC solely for criminal purposes which is required before the discovery requested in interrogatories numbers 2, 3, and 8 will be authorized.

Because plaintiff Top Value Meats, Inc. has failed to show good cause for authorization of the discovery requests which are the subject of its motion to compel, Top Value Meats, Inc.'s motion to compel will be denied. Plaintiffs' motions to delay a ruling on defendants' motion for summary judgment until defendants respond to the interrogatories will be denied as moot.

V. *Pre-enforcement Review of FTC Orders to File a Special Report Under Section 6 of Federal Trade Commission Act.*

The Supreme Court has sanctioned, at least in *dicta*, actions to obtain pre-enforcement review of FTC orders to file special reports under Section 6 of the Federal Trade Commission Act, brought after issuance of a notice of default, but prior to expiration of the thirty day period after which daily penalties begin to accrue under Section 10 of the Federal Trade Commission Act. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 654, 70 S.Ct. 357, 94 L.Ed. 401, 417 (1950); *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 225–226, 82 S.Ct. 289, 7 L.Ed.2d 240, 252 (1961). The United States Court of Appeals for the Fifth Circuit has specifically authorized such actions. *Genuine Parts Company* v. *F.T.C.*, 445 F.2d 1382, 1392 (5th Cir. 1971). *See also: A. O. Smith Corp.* v. *F.T.C.*, 530 F.2d 515 (3rd Cir. 1976). The justification for allowing such actions is that a party subject to penalties which are accruing daily should not be required to await FTC action to enforce the orders and to recover the penalties before it can obtain judicial review of the validity of the orders.[5]

Before seeking preenforcement review, the person subject to the order is required to exhaust administrative remedies available to it in the FTC. *United States* v. *Morton Salt Co., supra; Genuine Parts Company* v. *F.T.C., supra;* Under Section 2.12(b), Title 16, Code of Federal Regulations, he may file before the FTC a motion to quash the order requiring it to file a special report. A motion to quash must be filed within ten days after service of the order unless an extension of time is granted.

Plaintiffs have failed either to allege or to affirmatively show that

[5] FTC orders for which daily accruing monetary penalties for noncompliance may be imposed should be distinguished from FTC orders for which only a single fine may be imposed for noncompliance in determining whether preenforcement review will be granted. When only a single fine may be imposed, preenforcement review will not be granted because a defense to the enforcement action is considered to provide an adequate remedy at law. *Anheuser-Busch, Inc.* v. *Federal Trade Commission*, 359 F.2d 487 (8th Cir. 1966); *Blue Ribbon Quality Meats, Inc.* v. *Federal Trade Commission*, Civil Action No. 75CV356–W–4–3 (W.D.Mo. September 9, 1976).

they have properly exhausted their administrative remedies. Although plaintiffs allege that "[c]ertain motions challenging the jurisdictional power of the FTC over corporations whose situation was similar to plaintiff were filed in FTC Investigation number 742–3080" and that defendant F. Kelly Smith has indicated that these motions were denied, plaintiffs do not allege that *they* filed *timely* motions to quash the orders requiring them to file special reports under Section 2.12(b), Title 16, Code of Federal Regulations. Further, defendants contend that only one plaintiff, Guaranteed Quality Meats, Inc., filed a motion to quash, and that its motion was denied because it was untimely.

Plaintiffs' failure to properly allege that they have exhausted the administrative remedies available to them, and their failure to affirmatively show that they filed timely motions to quash in response to defendants' contention to the contrary, warrants dismissal of these actions. However, because several of plaintiffs' defenses to the FTC orders asserted in the complaint are also asserted in plaintiffs' replies to the counterclaims, in the interest of a full adjudication of the issues each of plaintiffs' claims will be considered.

VI. Merits.

In a proceeding to enforce an administrative subpoena, the issues to be determined are: (1) whether the inquiry is one the administrative agency is authorized to make; (2) whether the materials and information requested are reasonably relevant to the inquiry; and (3) whether the disclosures requested are "reasonable", i.e., not too broad, indefinite, or unduly burdensome. *United States* v. *Powell*, 379 U.S. 48, 855 S.Ct. 248, 13 L.Ed.2d 112 (1964); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946).[6] The burden is on the subpoened party to demonstrate the insufficiency of the subpoena. *United States* v. *Powell*, *supra*; *F.T.C.* v. *MacArthur*, *supra*.

In addition to defenses based on FTC authority, relevance, and reasonableness, plaintiffs contend that they were not properly served with the orders directing them to file special reports and the notices of default, and that they are not subject to the jurisdiction of the FTC.[7] These claims will be initially considered.

[6] *Accord: E.E.O.C.* v. *Quick Shop Markets, Inc.*, 526 F.2d 802 (8th Cir. 1975); *Federal Maritime Commission* v. *Port of Seattle*, 521 F.2d 431 (9th Cir. 1975); *F.T.C.* v. *Texaco, Inc.*, 517 F.2d 137 (D.C.Cir. 1975); *S.E.C.* v. *Brigadoon Scotch Distributing Co.*, 480 F.2d 1047 (2nd Cir. 1973); *Genuine Parts Company* v. *F.T.C.*, 445 F.2d 1382 (5th Cir. 1971); *Adams* v. *F.T.C.*, 296 F.2d 861 (8th Cir. 1961); *Comet Electronics, Inc.* v. *United States*, 381 F.Supp. 1233 (W.D.Mo. 1974), *affirmed*, 420 U.S. 999, 95 S.Ct. 1440, 43 L.Ed.2d 758 (1975); 1 Davis, *Administrative Law Treatise*, Section 3.12 (1958 ed.); Director "Procedural Requirements For Judicial Enforcement of Subpoenas Issued by Federal Trade Commission under §9 of Federal Trade Commission Act (15 U.S.C. §49)," 7 A.L.R. Fed. 347 (1971).

[7] Plaintiffs also make conclusionary allegations that the special reports seek confidential and privileged information, invade the attorney-client privilege, and violate the Fourth, Fifth and Fourteenth Amendments to the

(Continued)

A. Improper Service.

The record shows that each of the plaintiffs in the original six actions, and the defendant in the civil action No. 75CV578–W–2–3, were properly served with both the orders directing them to file a special report and the notice of default.

Plaintiffs Guaranteed Quality Meats, Inc., Twin City Beef Company, and Prime Meats, Inc. were served with the orders and notices of default by certified mail at their principal places of business. Therefore, service was proper under the regulations of the FTC, Section 4.4, et seq., Title 16, Code of Federal Regulations.

Plaintiffs Top Value Meats, Inc., Freezer World, Inc., Midwestern Meat Processors, Inc. and defendant Guaranteed Quality Meats, Inc. were served with the orders and notices through service by certified mail on the registered agents of each. Although the regulations of the FTC do not expressly provide for service on a registered agent, such service is considered proper with respect to these parties for the following reasons.

First, Top Value Meats, Inc. and Freezer World, Inc. ceased to have a business address prior to the date of service, as shown by the uncontroverted affidavits of F. Kelly Smith, staff attorney for the FTC, filed October 22, 1976. Service on the registered agent of a firm is reasonably likely to provide notice to the firm itself. Therefore, when the firm has no business address, the regulations are not considered to be binding and service on the registered agent is sufficient to meet the requirements of due process.

Second, Midwestern Meat Processors, Inc. was served by service upon the Corporation Trust Co. of Nevada in Reno, Nevada, presumably because Midwestern Meat Processors, Inc. is a Nevada corporation which does not have a place of business in that state. Service on a registered agent is deemed prima facie evidence that the firm itself received notice, and Midwestern Meat Processors, Inc. has

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Constitution of the United States.

Plaintiffs have failed to specifically state in what regard the special reports seek confidential and privileged information. To the extent that plaintiffs are claiming that the information requested constitutes a trade secret, the fact that information sought by the FTC constitutes a trade secret does not limit the power of the FTC to obtain it. *Federal Trade Commission* v. *Tuttle*, 244 F.2d 605, 616 (2nd Cir. 1957); *F.T.C.* v. *Green*, 252 F.Supp. 153, 157 (S.D.N.Y. 1966); *F.T.C.* v. *Waltham Watch Company*, 169 F.Supp. 614, 621 (S.D.N.Y. 1959). *See also: F.T.C.* v. *Manager, Retail Credit Co. Etc.*, 515 F.2d 988, 993 (D.C. Cir. 1975).

Because plaintiffs have failed to specifically state in what regards the special reports invade the attorney-client privilege, no further consideration is given to this contention even assuming such a contention to be a valid defense to an administrative subpoena.

Finally, there is no merit to plaintiffs' constitutional claims. The Fifth Amendment's proscription against compelled self-incrimination does not apply to corporations. *United States* v. *Morton Salt Co.*, *supra*, 338 U.S. at 651–652, 94 L.Ed. at 415–416. The requirements of the Fourth Amendment are met "if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevent." *Id.*, *Oklahoma Press Publishing Co.* v. *Walling*, *supra*. The Fourteenth Amendment does not apply to actions of the federal government.

failed to present any evidence tending to show that it did not obtain notice of the order and notice of default.

Finally, defendant Guaranteed Quality Meats, Inc. has admitted that it is the same firm as plaintiff Guaranteed Quality Meats, Inc. Since the latter was properly served, it is unnecessary to determine whether service on the former was proper. Nevertheless, service on the registered agent is prima facie evidence that Guaranteed Quality Meats, Inc. received the order and notice, and Guaranteed Quality Meats, Inc. has presented no evidence to the contrary.

It is therefore concluded that each of the orders and notices of default were properly served.

B. FTC Jurisdiction Over Plaintiffs

Plaintiffs assert that they are beyond the jurisdiction of the FTC for two reasons. First, they contend that their businesses are purely intrastate, and therefore they are not corporations "engaged in or whose business affects commerce", subject to Sections 5 and 6 of the Federal Trade Commission Act.[8] Second, plaintiffs claim that they are "packers" within the meaning of the Packers and Stockyards Act of 1921, Section 181 *et seq.*, Title 7, United States Code, and therefore are exempt from FTC jurisdiction under Section 5(a)(6) of the Federal Trade Commission Act.[9]

Plaintiffs' contentions that they are not subject to the jurisdiction of the FTC are prematurely raised. Whether a party is within the

[8] Section 5(a)(1) of the Federal Trade Commission Act, Section 45(a)(1), Title 15, United States Code, provides:

(a)(1) Unfair methods of competition *in or affecting commerce*, and unfair or deceptive acts or practices *in or affecting commerce*, are declared unlawful. (emphasis supplied).

Section 6 of the Federal Trade Commission Act is quoted in pertinent part in Note 1, *supra*.

[9] Section 5(a)(6) of the Federal Trade Commission Act, Section 45(a)(6), Title 15, United States Code, provides in pertinent part:

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations except . . . insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in Section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Section 406 of the Packers and Stockyards Act of 1921, Section 227, Title 7, United States Code, provides in pertinent part:

(a) The Federal Trade Commission shall have power and jurisdiction over any matter involving meat, meat food products, livestock products in unmanufactured form, or poultry products, which by this chapter is made subject to the power or jurisdiction of the Secretary, as follows:

(2) In any investigation of, or proceeding for the prevention of, an alleged violation of any Act administered by the Commission, arising out of acts or transactions involving meat, meat food products, livestock products in unmanufactured form, or poultry products, if the Commission determines that effective exercise of its power or jurisdiction with respect to retail sales of any such commodities is or will be impaired by the absence of power or jurisdiction over all acts or transactions involving such commodities in such investigation or proceeding. In order to avoid unnecessary duplication of effort by the Government and burdens upon the industry, the Commissioner shall notify the Secretary of such determination, the reasons therefor, and the acts or transactions involved, and shall not exercise power or jurisdiction with regard to acts or transactions (other than retail sales) involving such commodities if the Secretary within ten days from the date of receipt of the notice notifies the Commission that there is pending in his Department an investigation of, or proceeding for the prevention of, an alleged violation of this chapter involving the same subject matter.

(b) The Federal Trade Commission shall have no power or jurisdiction over any matter which by this chapter is made subject to the jurisdiction of the Secretary, except as provided in subsection (a) of this section.

coverage of a statute is a question which must be determined in the first instance by the agency responsible for administering the statute. The opportunity to obtain judicial review of jurisdictional objections in the Court of Appeals following completion of the agency proceedings has been repeatedly held to bar consideration of such claims at the investigational stage of the proceedings. *Eg: Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed.2d 614 (1946); *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 63 S.Ct. 339, 87 L.Ed. 424 (1943); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938); *F.T.C.* v. *Markin*, 532 F.2d 541, (6th Cir. 1971); *F.T.C.* v. *Gibson*, 460 F.2d 605 (5th Cir. 1972). Because the FTC should be given an opportunity to first determine whether plaintiffs are engaged in commerce or are "packers" as that term is defined under the Packers and Stockyards Act of 1921, plaintiffs' jurisdictional claims will be dismissed as premature.

One exception to the general rule that jurisdictional claims cannot be adjudicated prior to final agency action is when the agency has acted in excess of its delegated powers or contrary to a specific statutory mandate. *Leedom* v. *Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958). However, even if plaintiffs' claim, that the Packers and Stockyards Act of 1921 specifically precludes the FTC from asserting jurisdiction over them, falls within this exception, this claim is meritless. The FTC has jurisdiction over retail sales by "packers" so long as it does not duplicate proceedings in the Department of Agriculture.[10] Attached as Exhibit A to defendants' "Answer and Counterclaim" is a letter dated October 10, 1973 from Clayton Yeutter, Assistant Secretary of the Department of Agriculture to Charles A. Tobin, Secretary of the FTC, advising the FTC that:

> [t]he Packers and Stockyards Administration of this Department has no pending investigations or proceedings involving [Falcon Enterprises, Inc.]. the investigations referred to in your letter will not conflict or interfere with or duplicate any investigation or proceeding by the Packers and Stockyards Administration.

Therefore, the FTC has not acted "in excess of its delegated powers or contrary to a specific statutory mandate" by pursuing an investigation of plaintiffs in connection with its investigation of Falcon Enterprises, Inc.[11]

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[10] Section 406(b)(2) of the Packers and Stockyards Act of 1921, Section 227(a)(2), Title 7, United States Code. See Note 7, *supra*.

[11] Plaintiffs claim that the Yeutter letter is insufficient to prove that the Department of Agriculture has authorized an FTC investigation of *them* because (1) the letter does not refer to the plaintiffs which were in existence when the letter was written; and (2) certain of the plaintiffs were not incorporated until after the letter was written. However, the investigation of plaintiffs is subsidiary to the investigation of Falcon Enterprises, Inc. The authorization of the investigation of Falcon Enterprises, Inc. is therefore sufficient to constitute authorization of investigation of plaintiffs regardless when they came into existence.

C. Authority To Require Plaintiffs To File Special Reports.

The FTC is authorized to conduct investigations to determine whether corporations have violated Section 5 of the Federal Trade Commission Act which makes unlawful "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce. . . ."[12] Therefore, the FTC was clearly authorized to conduct an investigation

[t]o determine whether or not Falcon Enterprises, Inc., Patrick Faltico, and others may be engaged in unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, including fictitious pricing, false and misleading advertising and deceptive selling practices, in connection with the sale of meats and other related products in various states of the United States.

The FTC is also authorized to require corporations to file special reports containing information concerning the "organization, business, conduct, practices, management, and relation to other corporations . . . and individuals . . . ."[13] Thus, the FTC was clearly authorized to require plaintiffs to file special reports containing information useful in making a determination whether any of the plaintiffs were engaged, as one of the "others" with Falcon Enterprises, Inc. and Patrick Faltico, in conduct which violates Section 5 of the Federal Trade Commission Act. Further, the FTC is authorized to require plaintiffs to file special reports containing information relevant to the FTC investigation of Falcon Enterprises, Inc. and Patrick Faltico regardless whether plaintiffs are considered formal "parties" to the investigation. *F.T.C.* v. *Harrell*, 313 F.2d 854 (7th Cir. 1963); *F.T.C.* v. *Bowman*, 248 F.2d 456 (7th Cir. 1957); *F.T.C.* v. *Tuttle*, 244 F.2d 605 (2nd Cir. 1957).

It is therefore concluded that the FTC was authorized to require plaintiffs to file the special reports.

D. Relevance.

The information requested in the special reports must be "reasonably relevant" to the nature, purposes, and scope of the FTC investigation into whether Falcon Enterprises, Inc., Patrick Faltico, and "others" have been engaged in fictitious pricing, false and misleading advertising, and deceptive selling practices in connection with the sale of meats and other related products. The special reports meet this standard in all respects.

Part I of the special reports seeks information concerning the type of business organization; the date, state, and name of incorporation; principal place of business and retail or wholesale outlets operated by

[12] Note 1, *supra*.
[13] *Id.*

each plaintiff from 1970 through 1974; names and addresses of holders of more than 10 percent of plaintiffs' stock; names and addresses of subsidiaries and affiliates; and information concerning ownership and employment relationships of plaintiffs' shareholders, directors, and officers with other firms engaged in the marketing of freezer meats and with firms regularly providing certain specified services, such as consultation, management, accounting, and auditing, to persons or businesses engaged in the marketing of freezer meat or related products. This information is relevant to determine plaintiffs' organizational structure, and to determine what, if any, relationships exist between plaintiffs, Falcon Enterprises, Inc., Patrick Faltico, and other businesses in the freezer meat industry.

Part II of the special reports seeks information about "business methods", including information concerning contracts entered into by plaintiffs for services such as management, consultation, bookkeeping, accounting, auditing, employment, and advertising; franchise or licensing contracts between 1970 and 1974; business loans from other companies between 1972 and 1974; sales of installment contracts; use of services of collection agencies; names of suppliers of meat or poultry during 1973 and 1974; retail sales contracts; employees; and gross income. This information is relevant for purposes of determining the nature of plaintiffs' sales and purchasing practices, and to determine what relationships, if any, exist between plaintiffs, Falcon Enterprises, Inc., Patrick Faltico, and other related firms in the freezer meat industry. The answers to these inquiries will also provide the FTC with the names of other persons from whom information relevant to the investigation of Falcon Enterprises, Inc. may be obtained.

Part III of the special reports seeks information about "advertising", including the media used, the names of specific stations or publications in which plaintiffs have advertised during the six preceding months, advertising agencies used, and membership in and uses of the services of trade associations. This information is clearly relevant to determining whether plaintiffs and Falcon Enterprises, Inc. have been engaged in "fictitious pricing, false and misleading advertising and deceptive selling practices."[14]

E. Reasonableness.

Plaintiffs have alleged in a conclusionary manner that the special

[14] Defendant Guaranteed Quality Meats, Inc. contends that a determination must be made whether it is considered a "party" or merely a "witness" to the investigation before the issue of relevance can be determined. However, a determination of the status of Guaranteed Quality Meats, Inc. in the FTC investigation would be premature at this stage. The status of Guaranteed Quality Meats, Inc. in the investigation can only be determined after the relationship of the corporation with Falcon Enterprises, Inc., Patrick Faltico, and the other subpoenaed parties is determined. All of the information requested in the special report form is relevant to the investigation to determine what the relationship of Guaranteed Quality Meats, Inc. to the other companies is.

reports are unreasonable because they are overbroad and unduly burdensome. However, neither of these contentions has merit.

First, "broadness alone is not sufficient justification to refuse enforcement of a subpoena so long as the material sought is relevant." *Adams* v. *F.T.C.*, 296 F.2d 861, 867 (8th Cir. 1961). For the reasons stated in Part VI(D), *supra*, the information requested is relevant to the FTC investigation. Therefore, plaintiffs' overbreadth contention is meritless.

Second, the burden is on plaintiffs to show in what regard the special reports are unduly burdensome. *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, 327 U.S. at 217–218, 90 L.Ed. at 634–635; *F.T.C.* v. *Standard American, Inc.*, 306 F.2d 231, 235 (3rd Cir. 1962); *F.T.C.* v. *Markin*, 391 F.Supp. 865, 870 (W.D.Mich. 1974). "[T]he mere suggestion of possible damage to [plaintiffs'] business activities is not sufficient to block an authorized inquiry into relevant matters." *S.E.C.* v. *Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2nd Cir. 1973). Plaintiffs have failed to specify in what respects the special reports are unduly burdensome and therefore they have failed to carry their burden. Even if the burden were on defendants to affirmatively show the reasonableness of the special reports, the special reports do not appear on their face to be unreasonably burdensome.

Therefore, the orders directing plaintiffs' and defendant Guaranteed Quality Meats, Inc. to file the special reports will be enforced.

VII. *Forfeitures.*

Under Section 10 of the Federal Trade Commission Act, a party which fails to file a special report within thirty days of receipt of a notice of default is liable for statutory forfeiture of $100.00 for each day such failure continues.[15] Once a statutory forfeiture legally attaches, it cannot be judicially forgiven. *St. Regis Paper Co.* v. *United States*, *supra*. Plaintiffs are liable for the monetary forfeitures for two reasons.

First, plaintiffs did not seek a stay of the accrual of the forfeitures pending a judicial determination of the validity of the special reports. *St. Regis Paper Co.* v. *United States*, *supra*.

Second, even had plaintiffs moved for a stay pending judicial review, plaintiffs have failed to show good cause for issuance of a stay in this case. A stay is appropriate only when the challenged order "appears suspect" and the summoned party interposes reasonable, substantial, and nonfrivolous objections to the orders. *St. Regis Paper Co.* v. *United States*, *supra*; *Genuine Parts Company* v. *F.T.C.*, 445 F.2d 1382 (5th Cir. 1971). *See also: United States* v. *Morton Salt Co.*, *supra*; *Oklahoma*

[15] Note 3, *supra*

Operating Co. v. *Love*, 252 U.S. 331, 338, 40 S.Ct. 331, 64 L.Ed. 596 (1920); *United States* v. *Pacific Coast European Conference*, 451 F.2d 712 (9th Cir. 1971). *Compare: Brown & Williamson Tobacco Corp.* v. *Engman*, 527 F.2d 1115 (2nd Cir. 1975) — stay inappropriate when validity of cease and desist order is admitted. *But Cf: A. O. Smith Corp.* v. *F.T.C.*, 530 F.2d 515 (3rd Cir. 1976) — preliminary injunction standards applied. None of plaintiffs' objections to the orders directing them to file special reports in this case can be considered to be reasonable, substantial or nonfrivolous.

Therefore, judgment for the monetary penalties will be entered. Because it appears that plaintiff Guaranteed Quality Meats is the same entity as defendant Guaranteed Quality Meats, Inc., with respect to these parties, the monetary forfeitures will be limited to the former. If the FTC presents conclusive evidence that the latter is a completely separate entity, monetary penalties against the latter will be ordered.

For the foregoing reasons, it is therefore

ORDERED and ADJUDGED that the above-entitled actions be, and they are hereby, consolidated for purposes of a determination of the merits. It is further

ORDERED that defendants' first motion for summary judgment filed October 1, 1975 be, and it is hereby, denied without prejudice as moot. It is further

ORDERED that the motion of plaintiff Top Value Meats, Inc. to compel defendants to answer interrogatories be, and it is hereby, denied. It is further

ORDERED that plaintiffs' motion to delay ruling on defendants' motion for summary judgment until after defendants answer interrogatories be, and they are hereby, denied as moot. It is further

ORDERED and ADJUDGED that the complaints in Nos. 75CV350–W–3, 75CV351–W–3, 75CV352–W–4–3, 75CV353–W–3, 75CV354–W–2–3 and 75CV355–W–3 be, and they are hereby, dismissed without prejudice. It is further

ORDERED and ADJUDGED that plaintiffs Top Value Meats, Inc., Guaranteed Quality Meats, Inc., Twin City Beef Company, Prime Meats, Inc., Freezer World, Inc., and Midwestern Meat Processors, Inc., and defendant Guaranteed Quality Meats, Inc. be, and they are hereby, commanded to file on or before December 13, 1976 the special reports served upon them on February 28, 1975, February 14, 1975, February 12, 1975, February 13, 1975, March 4, 1975, and February 14, 1975, respectively. It is further

ORDERED, ADJUDGED, and DECREED that defendant Federal Trade Commission have and recover of and from plaintiffs Top Value Meats, Inc., Guaranteed Quality Meats, Inc., Twin City Beef Company, Prime Meats, Inc., Freezer World, Inc., and Midwestern Meat Processors, Inc.

monetary penalties in the amount of $100.00 per day from the date set forth hereinafter to the date a special report is filed with the Federal Trade Commission:

Top Value Meats, Inc.	May 18, 1975
Guaranteed Quality Meats, Inc.	May 25, 1975
Twin City Beef Company	May 18, 1975
Prime Meats, Inc.	June 15, 1975
Freezer World, Inc.	May 18, 1975
Midwestern Meat Processors, Inc.	May 19, 1975.

FEDERAL TRADE COMMISSION v. CARL E. HARTNACK, et al.*

Misc. No. 76-0144. F.T.C. File No. 99-326.

(United States District Court, District of Columbia, December 2, 1976)

On petition for subpoena enforcement, Court held that the subpoena *ad testificandum*, issued by the F.T.C. as part of its financial institution—energy company interlock investigation, should be enforced subject to the limitation that the officers need not reveal information received from bank customers until it is determined in the enforcement proceeding in New York (*FTC* v. *Rockerfeller, et al.*) that the Commission is entitled to the information.

JOHN J. SIRICA, *District Judge.*

MEMORANDUM AND ORDER

The Federal Trade Commission has petitioned this Court to enforce testimonial subpoenas issued against three officers of the Security Pacific National Bank of California. The respondents have raised substantial objections to the power of the Commission to obtain all of the information sought by the subpoenas—objections which are very similar to ones being raised by other banks in a proceeding now going on in the District Court for the Southern District of New York to enforce certain documentary subpoenas against those banks.

The respondents have also argued that the Court should consider transferring this proceeding to New York or delaying action until the proceedings in New York have been completed. But the Commission has questioned very strongly whether the Court can or should do either of these things.

The questions raised by both parties are difficult ones. If the Court finds that it must decide any of them, this could well lead to time-consuming litigation in which everyone would lose. The respondents, however, have suggested a compromise. They proposed it directly to the Commission in their motions to quash or limit these subpoenas and they have proposed it again, although somewhat indirectly, to this Court. They have noted that under California law information revealed by customers to banks cannot thereafter be disclosed by banks to unauthorized persons. *Burrows* v. *Superior Court of San Bernardino County*, 13 Cal. 3d 238, 118 Cal. Rptr. 166, 169, 529 P.2d 590, 593 (1974). See *Valley National Bank of Nevada* v. *Superior Court of San Joachin County*, 15 Cal. 3d 652, 125 Cal. Rptr. 533, 542 P.2d 977 (1975). The respondents' primary concern has been that before they disclose this

* Not otherwise reported.

information to the Federal Trade Commission they be certain that the Commission is authorized to obtain it. Apparently, then, they would object only to questions concerning customers' accounts and then only unless and until it should become clear from the proceedings now taking place in New York that the Commission is entitled to this information.

The Court finds that this compromise is in the interest of conserving judicial time, in the interest of providing swift enforcement of Commission subpoenas to the extent possible, and in the interests of fairness to the respondents and to Security Pacific National Bank. Accordingly, it is this 2nd day of December, 1976,

ORDERED that the respondents be, and hereby are, commanded to appear before a duly designated representative of the Federal Trade Commission at a time and place in Washington, D.C., to be designated by the Commission upon not less than ten (10) days notice, and then and there to testify as required by the subpoenas *ad testificandum* issued by the Commission on March 15, 1976, provided only that the respondents cannot be required to give information which might breach their duty of confidentiality, or that of the bank, under California state law unless and until it becomes clear that the other banks now engaged in enforcement proceedings in the Southern District of New York are not entitled to withhold this information.

FEDERAL TRADE COMMISSION v. ASSOCIATED WAREHOUSE FOODS, Inc.*

Civ. A. No. 76 CV 256-W-3. F.T.C. File No. 99-311.

(United States District Court, Western District of Missouri, December 7, 1976)

On petition for default judgment, court held that defendant failed to comply with Federal Trade Commission show cause orders and raised no defenses to F.T.C.'s petition. Motion for default judgment granted.

WILLIAM H. BECKER, *Chief Judge.*

ORDER GRANTING PETITIONER'S MOTION FOR A DEFAULT JUDGMENT AND FINAL JUDGMENT DIRECTING RESPONDENT TO COMPLY WITH SUBPOENA DUCES TECUM

This is a petition by the Federal Trade Commission (hereinafter "FTC") under Section 9 of the Federal Trade Commission Act, Section 49, Title 15, United States Code, to compel respondent Associated Warehouse Foods, Inc. to produce documentary evidence in accordance with a subpoena duces tecum issued by the FTC on July 23, 1975, in connection with an FTC investigation, FTC File No. 742 3080, as modified.[1] The FTC has moved for a default judgment.

The petition was filed on April 29, 1976. On that date, respondents were directed to show cause in writing on or before May 17, 1976, why the petition should not be granted. The return of service of the United States Marshal shows that respondent was served with a copy of the show cause order on May 5, 1976, by service upon Byron Neal Fox, Esq., registered agent of respondent. Respondent filed no response to the show cause order.

On September 23, 1976, the FTC filed a motion for default judgment because of the failure of respondent to respond to the show cause order. On October 13, 1976, respondent was directed to show cause on or before October 26, 1976, why a default judgment should not be entered. A copy of the show cause order was served on the registered agent of respondent by certified mail, but respondent did not file a response.

Because respondent has failed to comply with the show cause orders entered by the Court, and because no defenses to the FTC petition have been raised,[2] the motion of the FTC for a default judgment will be granted. Respondent will be directed to produce the documentary

* Not otherwise reported.

[1] The July 23, 1975 subpoena duces tecum was modified by the FTC on October 23, 1975.

[2] Numerous defenses raised to similar subpoenas in related actions have been found meritless. *Top Value Meats* v. *Federal Trade Commission*, Civil Action No. 75CV350-W-3 (W.D.Mo. November 27, 1976).

evidence specified in the subpoena duces tecum, as modified, at a time and place to be specified by the F.T.C.

For the foregoing reasons, it is therefore

ORDERED that petitioner's motion for a default judgment be, and it is hereby, granted. It is further

ORDERED and ADJUDGED that respondent be, and it is hereby, commanded to produce the documents specified in the FTC subpoena duces tecum issued July 23, 1975, as modified, at a time and place to be specified by petitioner.

FEDERAL TRADE COMMISSION v. KENNETH C. SWANSON, et al.*

Civ. A. No. 76-3570-G. F.T.C. File 99-325

(United States District Court, District of Massachusetts, December 13, 1976)

On petition for subpoena duces tecum enforcement, court held that an order for compliance of subpoenas issued under FTC's authority to conduct investigations for lawful purpose, was proper. Further, the investigation did not intrude on rate structure or aircraft operations, primary responsibilities of the Civil Aeronautics Board, but involved only air carrier's allegedly false advertising of hotel accommodations offered as part of a package tour; and at this early stage of administrative proceedings, to rule on the question of whether FTC encroached on CAB's authority would be a judicial intrusion.

Order for subpoena enforcement entered.

Rodney E. Gould, Boston, Mass., for plaintiff.

Howard S. Boros, of *Boros & Garafalo*, Washington, D.C., for plaintiff.

Before GARRITY, *District Judge*.

MEMORANDUM OF DECISION

By order entered contemporaneously with this memorandum the court has allowed plaintiff's petition seeking enforcement of administrative subpoenas duces tecum. We have considered scholarly memoranda submitted by counsel and heard oral argument. It would be possible to write a lengthy memorandum of decision on several issues, but the press of other business prevents this. In our opinion the court lacks discretion to decline to order compliance with petitioner's subpoenas under Section 9 of the Federal Trade Commission Act, 15 U.S.C. (Supp. IV) § 49. Conversely, the court must order compliance if the investigation to which the subpoenas are related is within the authority of the administrative agency, that is to say, as counsel agreed at the hearing, if the investigation is pursuant to a lawful purpose to investigate of the FTC. *Endicott Johnson Corp.* v. *Perkins*, 1943, 317 U. S. 501, 509.

We take a slightly different view of the controlling issue, believing that the proper test is whether the investigation is for an arguably lawful purpose, i.e., one that cannot be said to be unlawful at least at this early stage of the administrative proceedings. It is clear that many activities of the respondents are subject to regulation and investigation by the Civil Aeronautics Board because they are air carriers within

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶61,270 at 70,854 (1976-1 Trade Cases).

the definition of 49 U.S.C. § 1301(3). It is also clear that air carriers, to the extent they are subject to CAB regulation, are exempt from duplicative regulation by the FTC. 15 U. S. C. (Supp. IV) § 45(a)(6). However, at the investigative stage of an administrative proceeding, the court's role in reviewing an administrative proceeding is quite narrow. *Oklahoma Press Publishing Co.* v. *Walling*, 1946, 327 U. S. 186, 214. In our view it would be a judicial intrusion into the presumptively legal investigative activities of the FTC for the court to rule as a matter of law at this early stage that the FTC is exceeding its lawful authority, and intruding upon the jurisdictional province of the CAB. The primary, albeit not exclusive, concern of the CAB with respect to respondents is the impact of their activities upon rate structures and actual operations of direct air carriers. See 49 U.S.C. §§ 1371 et seq. Also, respondents must concede, we think, that there are some aspects of respondents' businesses which are the proper concern of the FTC, e.g., allegedly false advertising of hotel accommodations offered as part of a package tour. We could rule that the FTC would be invading the statutory and regulatory responsibility of the CAB were it to attempt to regulate activities of respondents intimately connected with rate structure or operations of aircraft, e.g., the cost of connected ground transporation. This, however, is not that case and it is impossible for the court at this time to draw a line around permissible FTC investigation pursuant to its resolution adopted March 22, 1976. See *FTC* v. *Crafts*, 1957, 355 U. S. 9, rev'g mem., 244 F.2d 882 (2 Cir.); *FTC* v. *Miller*, CCH 1976–1 TRADE CASES ¶ 60,926 at 69,034–36 (N. D. Ind. 1976), appeal pending.

GROLIER, INC., et al. v. FEDERAL TRADE COMMISSION, et al.*

Civ. A. No. 76–1559

(United States District Court, District of Columbia, December 13, 1976)

In Freedom of Information Act suit, court held that since interrogatories employed by plaintiffs might have invaded sectors protected under the Act, the Federal Trade Commission was entitled to a protective order; and parties seeking discovery under the Freedom of Information Act should not use interrogatories or other tools that may reveal exempted information.

Before FLANNERY, *District Judge*.

ORDER

This matter came before the court on defendants' motion for a protective order pursuant to Rule 26(c) of the *Federal Rules of Civil Procedure*. After consideration of the motion, memoranda submitted in support thereof, opposition thereto, and the entire record herein, the court is of the opinion that defendants have demonstrated good cause for the issuance of a protective order and that such an order should issue forthwith. Defendants have provided a detailed justification and index for documents withheld, as is required by *Vaughn* v. *Rosen*, 484 F. 2d 820 (D. C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), and a supporting affidavit from Charles A. Tobin, Secretary of the Federal Trade Commission, attests to the fact that the index lists all of the documents responsive to plaintiffs' request under the Freedom of Information Act. If the above materials are sufficient to show that the remaining withheld documents are exempt from disclosure under the Act, 5 U. S. C. § 522(b)(5), then the court will no longer have jurisdiction over plaintiff's complaint.

While it is true that discovery procedures are sometimes appropriate in actions under the Freedom of Information Act, every case under the Act is not susceptible to the use of discovery techniques. Specifically, interrogatories and other discovery devices should not be employed in a Freedom of Information Act suit to give the party seeking discovery more information than that to which he is entitled under the Act. Because plaintiffs' interrogatories may introduce into areas protected from disclosure by the terms of the Act, the court will grant the motion for protective order pending decision on defendants' motion to dismiss or, in the alternative, for a summary judgment.

Accordingly, it is, by the court, this 13th day of December, 1976,

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶61,206 at 70,490 (1976–2 Trade Cases).

Ordered that defendants' motion for a protective order be, and the same hereby is, granted; and it is further

Ordered that answers to plaintiffs' interrogatories, or to any other discovery procedure, are hereby stayed pending further order of the court.

UNITED STATES v. SAKS & CO., BERGDORF GOODMAN, INC., GENESCO, INC., BARRIE SOMMERFIELD, AND LEONARD HANKIN*

No. 74 Cr. 940 (HFW).

(United States District Court, Southern District of New York, December 17, 1976)

On an FTC request for order permitting access to grand jury documents, court held that the agency, under its investigatory powers, was authorized access to all such documents, relative to its investigation of the women's wear industry, including those of third parties not under formal investigation. However, court provided that affected parties must be notified regarding any material FTC copied; and given 10 days' notice and an opportunity to object before such documents were publicly disclosed. Access to all documents granted.

Robert J. Lewis, Gen. Counsel, *Gerald P. Norton,* Deputy Gen. Counsel, *Gerald Harwood,* Asst. Gen. Counsel, and *Richard A. Givens,* Regional Director, New York, N.Y., for FTC; *Bernard Wehrmann, Melvin Lublinski,* and *Edward F. Corcoran,* of counsel, New York, N.Y., for Antitrust Division: for plaintiff.

Solinger & Gordon, New York, N.Y., for Saks & Co.; *Donovan Leisure Newton & Irvine,* New York, N.Y., for Genesco, Inc; *Wormser, Kiely, Alessandroni & McCann,* New York, N.Y., for Bergdorf Goodman, Inc.; *Paul, Weiss, Rifkind, Wharton & Garrison,* New York, N.Y., for Leonard Hankin; *Dewey, Ballantine, Bushby, Palmer & Wood,* New York, N.Y., for Elizabeth Arden, Inc.; *Gould & Wilkie,* New York, N.Y., for Lord & Taylor and Peter Torrey; *Arnold & Porter,* Washington, D.C., for Bloomingdales: for defendants.

Before WERKER, *District Judge.*

OPINION

With leave of the court, each of corporate and individual defendants in this criminal antitrust action pleaded *nolo contendre* and, thereafter, was sentenced. Now, the Federal Trade Commission (FTC) has applied for an order permitting it to inspect and copy all of the documents produced "pursuant to subpoenas issued in connection with the grand jury's investigation which resulted in the indictment in this case." The FTC contends that it needs these documents as part of an ongoing, nationwide investigation of practices in the women's clothing industry. Several of the defendants and other individuals and corporations which were not parties to either this action or related civil actions ("third parties") have raised objections to the FTC application.

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶61,201 at 70,473 (1976-2 Trade Cases).

The grand jury documents which the FTC seeks were impounded at the direction of this court on February 25, 1976, but counsel for the plaintiff class action representatives and the defendants in several companion treble damage actions[1] were permitted to inspect and copy the documents with certain named exceptions.[2] Under the terms of the court's February 25, 1976 order, the FTC cannot gain access without leave of the court to the impounded grand jury documents which are now held by the Antitrust Division of the Department of Justice.

The indictment in this action charged that the corporate defendants, retailers of women's clothing in the New York metropolitan area, and the individual defendants, officers of the corporate defendants, combined and conspired with other unnamed co-conspirators to unreasonably restrain trade in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1970). In essence, it was alleged that the defendants and others had conspired to fix the prices of women's clothing. The current FTC investigation seeks to determine whether "various manufacturers, distributors and retailers of women's apparel and other persons * * * may be engaged in unfair methods of competition and unfair acts or practices which may be in violation of Section 5 of the Federal Trade Commission Act, [as amended, 15 U. S. C. § 45 (1970)], including but not limited to resale price maintenance and conspiracy to cause boycotts in connection with the sale and marketing of such products in the United States." The FTC maintains that the corporate defendants in the instant action are not included among the eighty manufacturers, distributors and retailers presently under investigation.

An applicant must generally demonstrate, with particularity, its need for subpoenaed grand jury documents in order to overcome the secrecy requirements imposed by Rule 6(e) of the Federal Rules of Criminal Procedure. *United States* v. *Proctor & Gamble Co.*, 356 U. S. 677 (1958). However, Rule 6(e) is not intended to insulate from all future discovery documents which were presented to the grand jury. As Judge Lumbard, formerly the Chief Judge for this circuit, observed in *United States* v. *Interstate Dress Carriers, Inc.*, 280 F. 2d 52, 54 (2d Cir. 1960):

> * * * [I]t is not the purpose of the Rule to foreclose from all future revelation to proper authorities the same information or documents which were presented to the grand jury. Thus, when testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed

[1] These actions are *Siskind* v. *Goodman*, 74 Civ. 4413 (HFW); *Dennis* v. *Saks & Co.*, 74 Civ. 4419 (HFW); *Walcavage* v. *Saks & Co.*, 74 Civ. 4491 (HFW); *Fleischman* v. *Genesco, Inc.*, 74 Civ. 4502 (HFW); *Levanne* v. *Saks & Co.*, 75 Civ. 180 (HFW); *Price* v. *Goodman*, 75 Civ. 268 (HFW).

[2] The February 24, 1976 order denied access to documents submitted to the grand jury by John Merrick, Lord & Taylor and Bloomingdales. Subsequent orders denied access to documents submitted by Elizabeth Arden, Inc., Henri Bendel, Inc., Geraldine Stutz, John Boland, William Fine and B. Altman, Inc.

to a grand jury or that the same documents had been, or were presently being, examined by a grand jury.

It is evident from the representations of the FTC that it is pursuing an investigation well within its statutory authority. See *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948). Similarly, since the corporate defendants in the instant action are not included among the many corporations presently under investigation by the FTC, it is apparent that the FTC has not made its request merely to learn what took place before the grand jury. Indeed, in the absence of a request to inspect the minutes of the grand jury, the FTC will not be able to determine which documents the grand jury considered significant. I conclude, therefore, that the FTC application is made pursuant to an independent lawful investigation and that it may be granted.

Entry of the requested order will not impede any activities of the grand jury as the defendants have already pled and been sentenced. Moreover, since the FTC can inspect and copy the requested documents in any event under section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49 (1970), it is in the public interest to enter this order so that the FTC can proceed with its investigation at a minimum of expense to the taxpayers.

Several of the third parties contend that discovery of the documents they submitted should be denied because the parties to the treble damage action were previously denied access to such documents. However, the present application is made by a government agency empowered to enforce federal laws and it presents additional public policy considerations not raised by prior discovery requests. Consequently, the court will not deny access to the documents on this ground.

Some of the third parties also object to the present application because they have not been advised that they are presently under investigation by the FTC. Under section 9 of the Federal Trade Commission Act, the FTC

shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.

The third parties apparently believe that the power to compel the production of "such documentary evidence" must be read in tandem with the prior reference to "documentary evidence of any corporation being investigated or proceeded against." However, in view of the legislative history of the Federal Trade Commission Act, it has been held that the statute grants the FTC two entirely distinguishable powers. The second of these powers is contained in the phrase following the semicolon in the statutory excerpt above and it enables

the FTC to subpoena documentary evidence relating to any matter under investigation without first demonstrating that the owner of the document is under investigation. *Federal Trade Commission* v. *Tuttle*, 244 F. 2d 605, 615 (2d Cir.), cert. denied, 354 U.S. 925 (1957). By entering this order, therefore, the court is not enabling the FTC to obtain documents it could not otherwise require the third parties to produce.

Two modifications of the proposed FTC order, requested by firms responding to the motion papers, seem appropriate and have been made. First, the court will require the FTC to inform each person or corporation that submitted documents to the grand jury of any documents copied by the FTC as part of its present inspection. Second, the FTC will be required to give any person or corporation that submitted documents to the grand jury ten days' notice and an opportunity to object before such documents are made public.

As modified, the order will be entered.

So Ordered.

THRIFTY DRUG STORES CO., INC. v. FEDERAL TRADE COMMISSION*

Civ. A. No. 76–2013. F.T.C. File No. 99–334.

(United States District Court for the District of Columbia, December 17, 1976)

In action seeking to restrain Federal Trade Commission from releasing documents transmitted to agency during non-public investigation, court held that in preliminarily enjoining the Commission from releasing the material in toto, business and financial documents containing information which could be used by competitors to the detriment of the corporation's competitive position should be withheld, whereas some of the documents, with deletions, could be released without causing competitive harm.

Motion for preliminary injunction granted in part and denied in part.

Richard C. Warmer, Washington, D.C., for plaintiff.

Jordan A. Luke and *Robert M. Werdig*, Washington, D.C., for defendant.

Before GREEN, *District Judge*.

MEMORANDUM ORDER

This matter is presently before the Court on plaintiff's motion for a preliminary injunction and defendant and defendant-intervenor's opposition thereto. On October 29, 1976, a temporary restraining order was entered in the instant action setting forth the relevant background facts which are incorporated herein by reference.

In accordance with *National Parks and Conservation Assn.* v. *Kleppe*, Civil Action No. 76–1044 (D. C. Cir. decided November 15, 1976)(National Parks II), an evidentiary hearing was held December 1, 1976 on the motion for preliminary injunction concerning the issue of whether release of the documents in dispute would cause substantial competitive injury to plaintiff herein.

In light of the material presented at the evidentiary hearing, and the record herein, the Court makes the following findings of fact and conclusions of law with respect to the categories of documents in dispute.

Although certain individual stores within the plaintiff's chain may not face direct substantial competition from competitors, the Thrifty chain as a whole, which comprises nearly 500 stores throughout nine western states, does face active and substantial competition.

It is also unrebutted that the intense competition within the retail drug and discount business, of which Thrifty is a part, places great emphasis on advertising and promotional efforts, and store manage-

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶61,194 at 70,408 (1976-2 Trade Cases).

ment, operation and design so as to attract the greatest number of customers by offering the lowest possible price for an item while still producing a profit. Thrifty has been particularly successful and boasts one of the largest chains of its type.

It is also unrebutted that Thrifty's operations have remained relatively unchanged over the years and that definite consistent trends in its operations exist. In view of this, seemingly outdated financial information would be significant to present day business realities.

Broadly described, the documents and hearing testimony at issue herein relate to the purchases and inventories of Thrifty, and the advertising allocations and arrangements made with vendors.

Under the first category, the documents at issue include Thrifty's statement of purchases from 1969 to 1973, Thrifty's Purchase Orders and Invoices relating to 1970 and 1971, Buyers' Recap and Warehouse Purchases v. Budget Forms. These documents permit a comprehensive financial profile to be drawn of the operations of Thrifty. Basically, the forms taken together, reflect purchases by departments for each vendor, potential gross profit percentages, projected budget allocations and inventory (in stores and warehouses) for set time periods. Since Thrifty's store layout and design remain relatively unchanged, competitors could utilize the material provided in each type of document discussed above and avoid the business pitfalls of trial and error to determine Thrifty's method of success at moving items, to establish which vendors' products are desirable and successful on the market, and to calculate Thrifty's profit margin, thereby leaving Thrifty vulnerable to retail price changes by competitors.

In view of the foregoing, the Court concludes that release of this information in toto would be likely to cause substantial harm to the competitive position of Thrifty.

The Court, however, is bound to release whatever is possible if portions of the documents may be deleted without causing injury. 5 U. S. C. 552(b). Plaintiff has conceded that competitive harm would not befall Thrifty if certain deletions from the material were made before release. Therefore, the following items may be released with the deletions as specified:

1. Statement of Purchases with the deletion of all information set forth in the two columns headed "Vendor's Number" and "Vendor's Name", including the code numbers which appear after each vendor's name.

2. "Buyer's Recap" forms as exemplified by plaintiff's exhibits 7 through 11:

(a) As to each of the forms exemplified by plaintiff's exhibits 7 and 8, delete the name of the department and buyer and delete the figures set forth in the column headed "Potential Gross Profit %".

(b) As to each of the forms exemplified by plaintiff's exhibits 9 and 10, delete the name of the department and buyer and delete the figures contained in the columns headed "Potential G. P. %", "Promotional", "Seasonal" and "Staples".

(c) As to each of the forms exemplified by plaintiff's exhibit 11, delete the name of the buyer and department, delete the figures contained in the boxes headed "Potential Gross Profit Month to Date", "Budget Gr. Pr. %" and "Potential Gr. Pr. %" and delete the figures in the "Inventory" box at the bottom of these forms.

The Court will now turn to the arrangement files which contain figures on promotional allowances granted Thrifty and data reflecting allocation of resources to various advertising techniques. Since effective advertising plays a crucial role in undercutting one's competitor, especially in the retail drug and discount business, and when coupled with the statement of purchases, such information could give a profile of successful advertising techniques as demonstrated by Thrifty's experience, the Court concludes that release of the arrangement file as presently constituted would be likely to cause substantial competitive injury to Thrifty. Given the facts, however, that vendors must offer promotional allowances on the same or proportionately equal basis, certain information is public knowledge. The Court concludes, therefore, that the information contained on the forms, exemplified by the document denoted D–119, p. 16 of the November 6, 1976 sealed affidavit of Richard G. Eils, should be released as no substantial competitive injury will befall plaintiff by such action.

Lastly, it is uncontroverted that the sections contained in the hearing transcripts, the release of which are in dispute, contain information similar to that already outlined above. Consequently, the Court concludes that it also should be withheld for the reasons previously set forth.

In conclusion, the Court finds that Thrifty, as outlined above, has demonstrated a substantial likelihood of success on the merits, that the irreparable injuries will come to Thrifty by release of the documents, and that neither intervenor nor the public will be harmed by enjoining release of the material specified. *Virginia Petroleum Jobbers Assn.* v. *FPC*, 259 F.2d 921, 925 (D. C. Cir. 1958).

In accordance with the foregoing, it is by the Court this 17th day of December 1976,

Ordered that the plaintiff's motion for a preliminary injunction should be and the same hereby is granted in part and denied in part; and it is further

Ordered that the defendant, its officers, agents, servants, employees and attorneys, should be and the same hereby are restrained and

enjoined from releasing the documents or portions thereof except as specified above.

BRISTOL-MYERS CO. v. FEDERAL TRADE COMMISSION*

Civ. A. No. 76–1364. F.T.C. Docket No. 8917.

(United States District Court, District of Columbia, December 28, 1976)

In a Freedom of Information Act suit seeking access to certain F.T.C. documents, court denied the petition, holding that the sought documents were the work-product of F.T.C. attorneys, and as such, were exempt from discovery.

Stephen A. Weitzman, Washington, D.C., for plaintiff.

Lynne K. Zusman, Paul Figley, and *Oliver J. Trytell*, Washington, D.C., for defendant.

Before SMITH, *District Judge*.

OPINION

Plaintiff in this case is Bristol-Myers Company, the maker of three non-prescription internal analgesics—Bufferin, Excedrin and Excedrin P.M. Bristol-Myers is presently defending a Federal Trade Commission complaint (FTC Docket No. 8917) alleging false advertising of these products. The Commission is also carrying on adjudicative proceedings in two companion cases, *American Home Products, et al.*, and *Sterling Drug, Inc., et al.*

As part of its discovery in Docket No. 8917, Bristol-Myers applied for the issuance of one subpoena duces tecum and three subpoenas duces tecum et ad testificandum, all of which were directed to the FTC or its employees. However, on May 30, 1976, the administrative law judge handling the case denied access to a substantial portion of the documents sought. On May 6, 1976, Bruce Hafner, counsel for Bristol-Myers, served a Freedom of Information Act request on the Commission for most of the documents pertinent to the complaint proceeding. On May 10th, the request was modified, excluding any document already in the possession of Bristol-Myers.

In response to this request, the Commission has turned over to Bristol-Myers 3,160 documents, totalling 31,742 pages.[1] It withheld, however, 1,300 documents (3,000 pages). Some of these documents are the subject of this litigation, which is before the Court on the Commission's Motion to Dismiss, and Cross-Motions for Summary Judgment.

In its Motion to Dismiss, or in the alternative, for Summary Judgment, the government submitted an index of the withheld documents. See *Vaughn* v. *Rosen*, 484 F. 2d 820 (D. C. Cir. 1973), cert.

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶61,231 at 70,650 (1976–2 Trade Cases).

[1] By affidavit, the senior FTC attorney assigned to this case states that he has spent more than 374 hours in search of the requested documents.

denied, 415 U. S. 977 (1974). They were divided into nine discrete categories:

Category A. Intra-agency memoranda
Category B. 100 "Blue Minutes", i.e. reflections of the Commission's deliberations
Category C. Documents from Commissioners
Category D. Interview reports (of expert witnesses)
Category E. Correspondence between staff and consultants
Category F. One letter discussing a witness' dissatisfaction with his compensation
Category G. Drafts and comments (of proposed rules, notice orders and complaints)
Category H. Staff written reports of interviews by counsel
Category I. Memoranda from files of U.S. Pharmocopeial Convention

After examining the index, Bristol-Myers withdrew its request as to many of the documents. Others have been supplied to them through normal discovery channels. The remaining papers[2] are being withheld by the Commission under Exemptions 5[3] and 7A[4] to the Act's production rules. The Court finds the exemptions applicable. Accordingly, the Commission's Motion for Summary Judgment will be granted.

Category A. According to the index, the majority of the letters listed in this category are to the Commission from heads of one of the agency's divisions or bureaus. Others are inter-departmental. These letters and memos consist of recommendations and opinions pertaining to various aspects of the enforcement proceeding. Manifestly, the documents are not investigatory.[5] Consequently, exemption 7A is inapplicable. However, they are free from disclosure under the fifth exemption.[6] *Retail Credit Co.* v. *FTC*, 1976–1 TRADE CASES ¶ 60,727 (D.D.C. 1976).

Category B. These are the "blue minutes." They too fall under Exemption 5. *Ash Grove Cement Co.* v. *FTC*, 511 F. 2d 815, 816 (D. C. Cir. 1975).

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[2] The documents still disputed are: Category A—(a)(3), (a)(5), (a)(7)–(8), (b)(9), (b)(13)–(14), (b)(16)–(17), (b)(19)–(25), (b)(27); Category B; Category C—(a)(1), (a)(4), (b); Category D—(a) and (b) [factual portions only], (c); Category E—(a)(7), (a)(11)–(12); Category G—(a), (b), and (c); Category H. This amounts to 327 documents (765 pages).

[3] Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U. S. C. § 552(b)(5).

[4] Exemption 7A protects "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would interfere with enforcement proceedings." 5 U. S. C. § 552(b)(7)(A).

[5] The Commission index repeatedly invokes Exemption 7A in situations in which the exemption is not even arguably available.

[6] Citing *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132 (1975), Bristol-Myers has argued that certain documents in Categories A, B, C, and G are "final opinions . . . made in the adjudication of cases" and therefore must be disclosed. See 5 U. S. C. § 552(a)(2)(A). However, as counsel for Bristol-Myers acknowledged at oral argument on these motions, the operations of the NLRB are *sui generis*. Justice White's opinion in *Sears* carefully confined the holding there to the unique structure of the Labor Board. Therefore, *Sears* will not be invoked here.

Category C. The four memoranda to the Commission in subsection (a) of this category are from various Commissioners. Discussed are such matters as the weaknesses of the case, proposed revisions in the complaint, and the relative merits of proceeding by complaint, as opposed to rulemaking. None of these documents need be produced. See *Retail Credit Co.* v. *FTC, supra,* at pp. 68, 129–68, 130.

The items in subsection (b) to Category C are described as "over 50 Circulations and Routing Slips from Commissioners containing theories, strategies, reflections or plans to take action." Exemption 5 applies here as well. *Id.* at p. 68, 127.

Category D. Those papers in subsections (a) and (b) of this category are described as interviews, conversations and discussions with expert consultants. Plaintiff seeks only the factual portions of these documents. Essentially, the Commission takes the position that the factual material in these papers is not "in a form that is severable without compromising the private remainder of the documents." *EPA* v. *Mink,* 410 U. S. 73, 89 (1972); see *Montrose Chemical Corporation* v. *Train,* 491 F. 2d 63 (D. C. Cir. 1972); *Washington Research Project, Inc.* v. *Department of Health, Education and Welfare,* 504 F. 2d 238 (D. C. Cir. 1974). In view of the evident substantial and good faith compliance with the requirements of the law insofar as the other disputed documents are concerned, the Court will take the Commission at its word and not require in camera inspection.

Subsection (c) of the category is described as "reports of visits and conversations with expert consultants who are included on the witness list." Basically, these documents reflect discussions of trial strategy. The Court finds these exempt under both Exemptions 5 and 7A. See *Title Guarantee Co.* v. *NLRB,* 534 F. 2d 484 (2d Cir. 1976). *Climax Molybdenum Co.* v. *NLRB,* 539 F. 2d 63 (10th Cir. 1976). See also *Soucie* v. *David,* 448 F.2d 1067, 1078 (D. C. Cir. 1971); *Wu* v. *National Endowment for the Humanities,* 460 F. 2d 1030, 1032 (5th Cir. 1972).

Category E. Plaintiff seeks only three letters in this category. All are letters from complaint counsel to various experts. These are free from disclosure under Exemption 5. See *EPA* v. *Mink, supra; Hickman* v. *Taylor,* 329 U.S. 495 (1947).

Category G. This category consists of drafts of the complaint issued against Bristol-Myers and a draft of a "Notice of Formulation of Proposed Trade Regulation Rule Relating to Advertising of Analgesics and an attached memorandum." These documents fully reflect the deliberative processes and attorney work-product of the Commission and, therefore, are covered by Exemption 5. See *Retail Credit Co.* v. *FTC, supra,* at pp. 68, 126–68, 127.

Category H. This final category is composed of the notes, taken by Commission attorneys, of interviews taken in connection with the

companion case, *American Home Products, et al.*, of two experts. The interviews were conducted by counsel for American Home Products. The Commission contends that both sets of notes are exempt under section (b)(5) and (b)(7)(A).

While the Commission has failed to sustain its burden of showing both that these documents are investigatory records and that their production would interfere with its enforcement proceedings, the Court is satisfied that they are the work-product of the Commission's attorneys, and therefore free from disclosure under the fifth exemption.

BRISTOL-MYERS CO. v. FEDERAL TRADE COMMISION et al.*

No. 76 Civ. 2556 (CMM). F.T.C. Docket No. 8917.

(United States District Court, Southern District of New York, December 30, 1976)

On petition for discovery of whether witnesses had been improperly induced to refuse ex parte interviews, court held that such an order was not justified where the claim was premature and could be raised upon the issuance of F.T.C. order to cease and desist. Despite F.T.C.'s refusal to consider the matter, plaintiff had not yet exhausted its administrative remedies.

Petition denied.

Before METZNER, *District Judge*.

Defendants move for an order dismissing the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that the court lacks jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief can be granted. This motion is granted.

The background to this action begins on February 23, 1973, when the Federal Trade Commission issued an administrative complaint charging, *inter alia*, Bristol-Myers Company with misleading and unfair advertising with respect to certain of its products.

During a prehearing conference held on March 3, 1976, the administrative law judge ruled that proposed expert witnesses for the Commission were entitled, if they so desired, to have counsel for the Commission present at any interview conducted by counsel for Bristol-Myers, and that Commission counsel could communicate this ruling to all such expert witnesses. These guidelines also applied to interviews requested by Commission counsel of expert witnesses for Bristol-Myers.

On March 12, 1976, Bristol-Myers requested that the administrative law judge permit discovery to determine whether any of the Commission's counsel had instructed expert witnesses not to be interviewed without Commission counsel being present. This application was denied, as was a motion for reconsideration. The administrative law judge concluded that Bristol-Myers had shown no justification other than mere suspicion for this collateral discovery and that Bristol-Myers could move for appropriate relief if any case of improper influence came to light during any of the interviews of individual witnesses.

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* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶61,224 at 70,639 (1976-2 Trade Cases).

By petition, Bristol-Myers sought discretionary review by the Federal Trade Commission. This was denied.

Finally, on June 9, 1976, plaintiff instituted the instant action requesting this court to order the Commission to allow it to conduct discovery into whether counsel for the Commission improperly influenced any of their prospective witnesses not to grant *ex parte* interviews to plaintiff's counsel.

Bristol-Myers has failed to persuade this court that judicial intervention would be appropriate here. This claim is asserted prematurely and is properly dismissed for failure to exhaust administrative remedies. Judicial review of Federal Trade Commission proceedings is governed by Section 45(c) of Title 15, United States Code, which limits the power of review to final cease and desist orders. Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, provides:

> Agency action made reviewable by statute . . . [is] subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

If formal adjudicative procedures subsequently result in a cease and desist order, it seems clear that on review by a court of appeals Bristol-Myers will have an opportunity to press the claim that it was entitled to this discovery. *Bristol-Myers Company* v. *Federal Trade Commission*, 469 F. 2d 1116 (2d Cir. 1972).

Of course, this court would intervene where the preliminary procedural agency action threatened so irreparable an injury as to justify interlocutory resort to corrective judicial process. *Bristol-Myers Company, supra* at 1118. Bristol-Myers' alleged injury does not rise to this level. Its reliance on *International Business Machines Corp.* v. *Edelstein*, 526 F. 2d 37 (2d Cir. 1975) is misplaced. The impairment of the constitutional right to effective assistance of counsel in that case involved the trial judge's ruling that a transcript be made of all interviews of a witness in the absence of opposing counsel.

In this instance the administrative law judge permitted the opposing counsel to be present if the expert witness so requested. The evidence of any improper influence that in effect denied plaintiff the effective assistance of counsel is little more than mere suspicion.

It should be quite easy at the beginning of each interview for plaintiff, by appropriate questioning, to ascertain the facts and make a record for action by the administrative law judge.

Accordingly, defendant's motion is granted.

So ordered.

United States v. *The J.B. Williams Company, Inc.* — United States District Court, Southern District of New York; judgment in the amount of $125,000 was entered January 16, 1976, for violation of a cease and desist order prohibiting the representation that Geritol, or any similar preparation, would be beneficial in treating or relieving tiredness, loss of strength, run-down feeling, nervousness or irritability without disclosing that most people with these symptoms do not have them as a result of iron deficiency or iron deficiency anemia, and therefore, would not benefit by taking the preparation.

The company previously paid $155,000 in civil penalties, plus $22,005 interest, in the same suit in connection with its advertising of Fem Iron. The U.S. Court of Appeals (2d Cir. 1974) upheld that award but remanded the counts concerning the advertising of Geritol to the U.S. District Court for jury trial, 493 F.2d 414 (1974), IX S.&D. 938. The above settlement was for those remanded counts. (Docket No. 8547, 68 F.T.C. 481; *modified* 72 F.T.C. 865.)

United States v. *Firestone Tire & Rubber Company* — United States District Court, Northern District of Ohio; judgment in the amount of $800,000, $750,000 of which was to be used in tire safety advertising campaign, was entered February 13, 1976, for violation of an order to cease and desist requiring respondent to cease disseminating tire safety commercials without required disclosures. (Docket No. 8818, 81 F.T.C. 398.)

United States v. *Bestline Products Corporation* — United States District Court, Northern District of California; judgment in the amount of $1,036,000 was entered June 16, 1976, for violation of a final order to cease and desist prohibiting the deceptive and unfair operation of a multi-level (pyramiding) marketing program in the sale of Bestline soap and related products. (Docket No. C–1986, 79 F.T.C. 107; *modified* 85 F.T.C. 407.)

United States v. *Charles R. Johnson* — United States District Court, Eastern District of Maryland; judgment in the amount of $40,000 was entered June 27, 1976, for violation of an order to cease and desist prohibiting misrepresentations in connection with the sale of computer school courses. (Docket No. C–1569, *In re Technical Education Corporation, et al.;* 76 F.T.C. 181; *affirmed* 541 F.2d 710 (1976); *rehearing* and *rehearing en banc denied* Sept. 21, 1976.)

United States v. *Subscription Bureau Limited, et al.* — United States District Court, Eastern District of Virginia; judgment in the amount of $10,000 was entered July 16, 1976, for violation of an order

to cease and desist prohibiting certain misrepresentations and the failure to make required disclosures when recruiting magazine subscription solicitors and selling magazine subscriptions. (Docket No. C–2150, 80 F.T.C. 201.)

United States v. *Browning Arms Company* — United States District Court for the District of Utah; judgment in the amount of $155,127 was entered July 29, 1976, for violation of an order to cease and desist prohibiting the fixing of resale prices of its products. (Docket No. C–2212, 80 F.T.C. 749.)

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